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In the Supreme Court of the United States

OCTOBER TERM, 1997

ALEXIS M. HERMAN, SECRETARY OF LABOR,
PETITIONER

v.

L.R. WILLSON AND SONS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(2), provides that covered employers "shall comply with occupational safety and health standards promulgated under" the Act. Section 17(k) of the Act, 29 U.S.C. 666(k), classifies a violation of the Act as "serious" if it creates a substantial risk of death or serious physical harm, "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." The questions presented are:

1. Whether the Secretary must establish, as part of her affirmative case charging even a non-"serious" violation of Section 5(a)(2), that an employer knew or should have known of the existence of a violation.

2. Whether an employer's claim that violation of an applicable standard resulted from "unpreventable employee misconduct" is an affirmative defense, as to which the employer must bear the burden of persuasion.

3. Whether an employer's claim that it did not know, and could not with the exercise of reasonable diligence have known, of the existence of a violation is likewise an affirmative defense to classification of a violation as "serious" under Section 17(k).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the Occupational Safety and Health Review Commission was named as a respondent in the court of appeals. See App., *infra*, 1a; see also *id.* at 14a.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Labor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 134 F.3d 1235. The decision of the Occupational Safety and Health Review Commission (App., *infra*, 15a-40a) is reported at 17 O.S.H. Cas. (BNA) 2059 and 1995-1997 O.S.H. Dec. (CCH) ¶ 31,262. The decision of the administrative law judge (ALJ) (App., *infra*, 41a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1998. A petition for rehearing was denied on March 27, 1998. App., *infra*, 66a-67a. On June 17, 1998, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 5 and 17 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654 and 666, and the Secretary of Labor's safety standard concerning fall protection for steel erection, 29 C.F.R. 1926.750(b)(1)(ii), are reproduced at App., *infra*, 68a-72a.

STATEMENT

1. Respondent L.R. Willson and Sons was engaged to perform steel erection work related to the renovation of the Orange County Civic Center in Orlando, Florida. App., *infra*, 46a. An Occupational Safety and Health Administration (OSHA) inspector observed and videotaped two workers, later identified as respondent's employees, working about 80 feet above the ground without fall protection. *Id.* at 47a-48a. One of the workers, Randall Manley, was a foreman who was responsible for instructing members of his work crew on their assignments and for ensuring that the crew obeyed respondent's safety policies. *Id.* at 48a, 55a-57a.

The Secretary, through an OSHA inspector, cited respondent for violating 29 C.F.R. 1926.750(b)(1)(ii), a safety standard promulgated by the Secretary under the Occupational Safety and Health Act of 1970 (the

Act), 29 U.S.C. 651 *et seq.* That standard requires the use of safety nets during work on certain types of structures if the potential fall distance exceeds two stories or 25 feet. App., *infra*, 53a; see *id.* at 72a.[1] Having recently cited respondent for a number of alleged violations of the Act, including one involving fall protection (see *id.* at 46a-47a, 61a-62a), the Secretary characterized this violation as "willful" within the meaning of 29 U.S.C. 666(a), and notified respondent that she proposed to assess a civil penalty of $56,000. *Id.* at 58a; C.A. App. 9; see 29 U.S.C. 659(a). Respondent contested both the citation and the proposed penalty.

2. An administrative law judge (ALJ), acting for the Occupational Safety and Health Review Commission (OSHRC) (see 29 U.S.C. 659(c), 661(j)) and following Commission precedent, found that the Secretary had established a violation of the fall-protection standard by proving (1) the applicability of the fall protection standard, (2) failure to comply with the standard, (3) employee exposure to a hazard caused by the noncompliance, and (4) respondent's "actual or constructive knowledge of the violation (i.e., [that respondent] either knew or with the exercise of reasonable diligence could have known, of the violative conditions)."

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[1] As a matter of enforcement policy, OSHA does not cite employers for failing to provide nets so long as they use some system that offers equivalent or better fall protection. In this case, respondent generally used a system of fall-protection cables, to which employees were required to "tie off" while working at elevations above ten feet. See App., *infra*, 48a, 55a. Although that system is acceptable in principle, in this instance Manley "directed [a subordinate] to accompany him to work in an area where the fall protection cable had not been strung." *Id.* at 55a.

App., *infra*, 52a; see *id.* at 52a-58a.[2] With respect to respondent's "actual or constructive knowledge," the ALJ reasoned that Manley was a supervisory employee whose knowledge of the violation was properly imputed to respondent. *Id.* at 55a-58a.

The ALJ next considered respondent's "affirmative defense that any violation it committed was the result of unpreventable employee misconduct." App., *infra*, 58a; see *id.* at 58a-60a. Again applying OSHRC precedent, the ALJ observed that to establish that defense respondent was required to prove (1) that it had established work rules designed to prevent the violation; (2) that those rules had been adequately communicated to its employees; and (3) that it had taken steps to discover violations, and had effectively enforced the rules when violations were discovered. *Id.* at 58a. Although the ALJ found that respondent could establish the first two elements of the defense (which the Secretary did not dispute), see *id.* at 58a-59a, she credited Manley's testimony that he expected to be disciplined by respondent for violating fall-protection rules "if [an] OSHA [inspector] was on the job," but that "[i]f OSHA wasn't on the job, it's a completely different story" (*id.* at 59a). Concluding that Manley's admission "provide[d] insight into [respondent's] attitude towards enforcement, especially coming from

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[2] Respondent objected to the admission of videotape evidence of the violation at issue on the ground that it was obtained in violation of the Fourth Amendment and of Section 8 of the Act, 29 U.S.C. 657. See App., *infra*, 48a-51a. That argument was rejected by the ALJ (*ibid.*), the OSHRC (*id.* at 17a-26a; but see *id.* at 33a-40a (Comm'r Montoya, concurring in disposition but dissenting on this point)), and the court of appeals (*id.* at 4a-10a). We therefore do not address that evidentiary issue here.

a supervisory employee," the ALJ agreed with the Secretary that respondent had "failed to establish that its work rules were effectively enforced," and that its "unpreventable employee misconduct" defense must therefore fail. *Id.* at 60a.

The ALJ disagreed, however, with the Secretary's characterization of respondent's violation as "willful." App., *infra*, 60a-63a. Although the ALJ recognized that Manley, who participated in the violation at issue, was a supervisory employee, and that respondent had notice of previous fall-protection violations involving its workers, she concluded that "[t]he record [did] not demonstrate that [respondent] exhibited either intentional disregard for the Act, or plain indifference to its employees' safety," and that the Secretary had therefore "failed to establish that [respondent's] violation * * * was willful." *Id.* at 61a-63a. Noting that in this case two workers were exposed for 45 minutes to "a fall hazard of at least 75 feet, which would have resulted almost certainly in death had they fallen," the ALJ imposed a penalty of $7,000—the maximum authorized for a "serious" violation. *Id.* at 63a-64a.

3. The OSHRC exercised its discretion to review specified aspects of the ALJ's decision, and affirmed her disposition of the case. App., *infra*, 41a-42a (orders directing review), 15a-40a (Commission opinion). Although the bulk of the Commission's opinion addressed a different issue (see note 2, *supra*), in part it rejected the Secretary's argument that the ALJ had improperly characterized the violation as "serious" rather than "willful." App., *infra*, 16a, 26a. The Commission agreed that the Secretary had made out "a *prima facie* case of willfulness" by "establish[ing] that a supervisory employee knowingly violated the

fall protection standards." *Id.* at 27a-28a. It concluded, however, that although respondent "should have supervised its employees more closely," the company's "good faith efforts in enforcing its safety rules were sufficient to support a finding that the violation was not willful." *Id.* at 31a. Although it recognized that reservations about respondent's enforcement of its policies had led the ALJ to reject the company's "unpreventable employee misconduct" defense, the Commssion held that "[t]he failure to prove th[at] defense to the violation * * * does not preclude the employer from establishing the good faith defense to a willful characterization of the violation." *Id.* at 29a n.14.

4. With respect to the issues pertinent here, the court of appeals reversed. App., *infra*, 1a-13a; see note 2, *supra*. Relying on its previous decision in *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979), the court held that, "despite a finding of knowledge of [a] violation on the part of a supervisory employee, the [Secretary bears] the burden of proving that the supervisory employee's acts were not unforeseeable or unpreventable." App., *infra*, 10a. Conflating the issues of employer "knowledge" as part of the Secretary's case in chief and "unpreventable employee misconduct" as an affirmative defense, the court concluded that the Commission in this case had "incorrectly placed on [respondent] the burden of showing that the conduct of [its employees] was unforeseeable or unpreventable." *Id.* at 10a-12a.

The court acknowleged the position of several other circuits "that unpreventable employee misconduct 'is an affirmative defense that an employer must plead and prove'" (App., *infra*, 11a & n.29), but it concluded that its own precedent and cases from the Third and

Tenth Circuits "clearly agree[d] that such must be disproved by the Secretary in [her] case-in-chief" (*id.* at 11a & n.30). Finding *Ocean Electric*'s reasoning "consistent with the clear intent of the Act," which "did not intend [the] employer to be [an] insurer of employee safety," the court "reaffirm[ed] its application" in the Fourth Circuit. *Id.* at 12a & n.31.[3] Because the Commission had "placed the burden of showing 'good faith efforts to comply with the fall protection standards' squarely on" respondent (*id.* at 10a-11a, quoting *id.* at 28a (OSHRC opinion)), the court reversed the Commission's order and remanded for further proceedings. *Id.* at 11a, 13a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision reflects and perpetuates the "confusing patchwork of conflicting approaches" that prevails in the lower courts on fundamental questions concerning the burden of persuasion in proceedings to enforce compliance with federal workplace health and safety standards. See *L.E. Myers Co.* v. *Secretary of Labor*, 484 U.S. 989, 990 (1987) (White & O'Connor, JJ., dissenting from denial of certiorari). This case would provide an appropriate vehicle for this Court's review and resolution of those important questions.

1. Congress enacted the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, "to assure so far as possible every working man and woman in the

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[3] Judge Campbell of the First Circuit, sitting by designation, concurred separately on the ground that *Ocean Electric* was "controlling precedent in [the Fourth] Circuit." App., *infra*, 1a, 13a. "As a visitor," he saw "no occasion to decide, and [did] not decide," whether *Ocean Electric's* reasoning was correct or should be "reaffirm[ed]." *Id.* at 13a.

Nation safe and healthful working conditions." 29 U.S.C. 651(b). The Act requires covered employers to "comply with occupational safety and health standards promulgated" by the Secretary under the Act, and more generally to furnish every employee "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a); see also 29 U.S.C. 655 (providing for Secretary's promulgation of standards). Employees are also required to comply with promulgated standards, but only employers may be cited for violating the Act. 29 U.S.C. 654(b), 658-659, 666; *Atlantic & Gulf Stevedores, Inc.* v. *OSHRC*, 534 F.2d 541, 552-555 (3d Cir. 1976).

When the Secretary cites an employer, she requires abatement of the violation and generally proposes the assessment of a penalty. 29 U.S.C. 658(a), 659(a). The Act provides that for each violation that is "specifically determined not to be of a serious nature," a penalty of up to $7,000 "may" be assessed, while for each "serious" violation such a penalty "shall" be assessed. 29 U.S.C. 666(b)-(c). A violation is "serious," under the Act,

> if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in [the] place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. 666(k). For each "willful[]" or "repeated[]" violation, the Act provides for a penalty of up to $70,000. 29 U.S.C. 666(a).

An employer may contest the Secretary's citation or the penalty she proposes to assess, or both, and obtain a hearing before an administrative law judge of the Occupational Safety and Health Review Commission, an adjudicatory body created by the Act and independent of the Secretary. 29 U.S.C. 659(c), 661; see generally *Martin* v. *OSHRC*, 499 U.S. 144, 147-148 (1991). The ALJ's "report" becomes a final order of the Commission unless the Commission, on petition by the employer or the Secretary or on the motion of any Commissioner, directs further review of any or all issues. 29 U.S.C. 661(j); see 29 C.F.R. 2200.90(d), 2200.91-2200.92. The Commission's final decision is subject to review in the court of appeals for the circuit in which the violation occurred or in which the employer has its principal office (or, on the employer's petition, in the District of Columbia Circuit). 29 U.S.C. 660(a) and (b).

2. a. Under these statutory provisions, the proper course of proceedings in a case like this one is, in the Scretary's view, relatively straightforward. An employer who contests the Secretary's citation is entitled to an administrative hearing, and there is no question that at that hearing the Secretary bears the burden of proving the existence of a prima facie violation of the Act. See 29 U.S.C. 659(c) (hearings to be conducted in accordance with 5 U.S.C. 554); 5 U.S.C. 556(d); *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 276 (1994). Under the Act, that initial burden is discharged if the Secretary demonstrates noncompliance, in work carried out by or on behalf of the employer, with an applicable health or

safety standard promulgated in accordance with the Act. 29 U.S.C. 654(a), 658, 666.

Once the Secretary has made out her prima facie case of liability under the Act, the Secretary and the OSHRC agree that a cited employer should be able to avoid liability by establishing that a particular violation resulted from "unpreventable employee misconduct." See, *e.g.*, 59 Fed. Reg. 4320, 4349 (1994) (preamble to final rule governing electric power generation, transmission, and distribution facilities) ("[OSHA] recognizes unpreventable employee misconduct as an affirmative defense to a citation, and OSHA's policy is not to issue a citation where the employer has fulfilled his or her responsibilities to inform the employee of an adequate work rule and to enforce that rule uniformly," citing OSHA Field Operations Manual, Ch. 5, § E); App., *infra*, 58a (ALJ's decision). As articulated in OSHRC precedent, that defense requires an employer to prove (1) that it has established work rules designed to prevent the violation; (2) that those rules have been adequately communicated to its employees; and (3) that it has taken steps to discover violations, and has effectively enforced its rules when violations were discovered. App., *infra*, 58a. If an employer can establish the existence of those background circumstances, it is not held liable under the Act for an aberrant employee action in violation of company rules and OSHA safety standards. Compare *Faragher* v. *City of Boca Raton*, No. 97-282 (June 26, 1998), slip op. 28-30. Because such "unpreventable employee misconduct" is an affirmative defense, however, the employer properly bears the burden of raising it, introducing supporting evidence, and persuading the trier of fact that it applies. Compare *NLRB* v. *Transportation Management*

Corp., 462 U.S. 393, 401-403 (1983); see *Greenwich Collieries*, 512 U.S. at 278.

If the Secretary establishes the existence of a violation and the employer fails to establish that it resulted from unpreventable misconduct, there remains the further question whether the established violation is properly classified as willful, repeated, serious, or non-serious. See 29 U.S.C. 666. There is no dispute that the Secretary bears the initial burden of establishing that a violation is "willful[]" or "repeated[]" within the meaning of 29 U.S.C. 666(a), or "serious" within the meaning of Section 666(k). The "unless" language of Section 666(k) indicates, however, that it is the employer's responsibility to allege and prove that it "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation," if it wishes to avoid, on that basis, a determination that a potentially life-threatening violation was "serious."[4] Moreover, that statutory language, which appears only in the provision defining what constitutes a "serious" violation, makes clear that the issue of employer knowledge is *not* relevant at the antecedent stage of determining

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[4] As this case demonstrates, the OSHRC has adopted a similar structure for assessing claims that a violation involving a supervisor should be treated as "willful." Although "willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer," the employer's overall "good faith effort to comply with a standard or eliminate a hazard * * * may constitute a defense to willfulness." App., *infra*, 27a. The Secretary does not challenge here the OSHRC's ultimate determination that respondent's violation, although "serious," was not "willful." *Id.* at 31a.

whether the Secretary has established her prima facie case of violation *vel non*.[5]

b. The court of appeals accordingly erred in holding (App., *infra*, 10a-12a) that the Secretary bears the burden of proving, as part of her case-in-chief, that employee acts in violation of the Act were "not unforeseeable or unpreventable."

Most importantly, the court failed to recognize that the Secretary and the OSHRC have permissibly recognized "unpreventable employee misconduct" only as an affirmative defense to liability under the Act. As various courts of appeals have noted, the Act's declared goal of ensuring safe workplace conditions "so far as possible" (29 U.S.C. 651(b)) suggests that Congress did not intend the Act to be administered as a strict liability scheme. See, *e.g.*, *P. Gioioso & Sons, Inc.* v. *OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997); *Ocean Elec. Corp.* v. *Secretary of Labor*, 594 F.2d 396, 399 (4th Cir. 1979); see also 59 Fed. Reg. at 4349. Moreover, in the Secretary's view, allowing an employer to defend against a citation by establishing that it took all reasonable steps to prevent the violation encourages employers to develop and enforce effective safety programs, which is consistent with the Act's overall goal of preventing accidents before they happen. See 54 Fed. Reg. 3904, 3910 (1989)

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[5] The Secretary disagrees, to that extent, with the ALJ's statement of the elements of the prima facie case. App., *infra*, 52a; see also *New York State Elec. & Gas Corp.* v. *Secretary of Labor*, 88 F.3d 98, 106-108 (2d Cir. 1996) (discussing this issue). Although that statement follows OSHRC precedent, it conflicts with the plain terms of the Act, which specifically address the relevance of employer knowledge or negligence, but only in the context of distinguishing "serious" from non-"serious" violations.

(OSHA's Safety and Health Program Management Guidelines); *Secretary of Labor* v. *Ocean Elec. Corp.*, 3 O.S.H. Cas. (BNA) 1705, 1706-1707 (OSHRC 1975) ("A rule which encourages diligence rather than renders it irrelevant is to be preferred."), rev'd as to burden of proof, 594 F.2d 396 (4th Cir. 1979); see also *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 12 (1980) ("the [Act's] remedial orientation is prophylactic in nature"); compare *Faragher*, slip op. 28 (Title VII's "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.").[6]

The Secretary and the OSHRC have therefore agreed that an employer should be able to avoid liability under the Act if it can demonstrate the conditions specified by the OSHRC in articulating the "unpreventable employee misconduct" defense. See 54 Fed. Reg. at 3910. Because, however, that formulation of the basis for avoiding liability rests on what are essentially policy-based judgments concerning the appropriate interpretation and administration of the Act (see, *e.g.*, *Ocean Elec.*, 3 O.S.H. Cas. (BNA) at 1706-1707), the Secretary and the OSHRC have reasonably treated it as an affirmative defense that must be pleaded and proved by the employer. Compare

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[6] See also 29 U.S.C. 651(b) and (b)(1) (declaring the purpose and policy of Congress to assure "so far as possible every working man and woman * * * safe and healthful working conditions * * * by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions").

Transportation Management, 462 U.S. at 401-403; cf. *Faragher*, slip op. 28-30.[7]

Apart from this central error, the court of appeals' opinion illustrates the fundamental confusion that has too often prevailed in interpreting the enforcement provisions of the Act. The court's brief discussion conflates the "unpreventable employee misconduct" issue with the separate, though related, issue of employer "knowledge" of a violation. See App., *infra*, 10a. As we have explained, the "knowledge" issue properly arises, under the text of the Act, only in determining whether a particular violation is to be characterized as "serious" under 29 U.S.C. 666(k). Compare 29 U.S.C. 654(a)(2) (imposing on employers a facially absolute duty to comply with health and safety standards promulgated under the Act). Moreover, in that context, the statutory language, which specifies that a violation is "serious" under certain circumstances "unless" the employer did not know of its existence, makes clear that excusable *lack* of

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[7] Treating "employee misconduct" as an affirmative defense is also consistent with traditional criteria for assigning the risk of nonpersuasion. The employer will, for example, inevitably have better access than the Secretary to relevant information concerning the nature and adequacy of its workplace safety program. See *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993). Moreover, it makes sense to assign the burden of persuasion to the party whose position is less consistent with ordinary expectations; and because it is reasonable to assume that employees normally follow rules that are adequately communicated and enforced, a violation of a health or safety standard is more likely to have resulted from an employer's failure to meet its duty to "assure compliance by [its] own employees," S. Rep. No. 1282, 91st Cong., 2d Sess. 10 (1970), than from "unpreventable misconduct."

knowledge is a defense that an employer may raise in order to *avoid* a determination that a particular violation was "serious." See *Panhandle Producers & Royalty Owners Ass'n* v. *Economic Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987) (use of term "unless" ordinarily means that the party claiming the benefit of the exception has the burden of proving it); 2A N. Singer, *Sutherland Statutory Construction* § 47.11 (5th ed. 1992).

Thus, under the language of the Act, it is never the Secretary's burden to show that an employer knew or should have known that its employees were violating an OSHA standard. At a minimum, proof of knowledge cannot plausibly be viewed as part of the Secretary's "case-in-chief" on liability (App., *infra*, 11a), because the Act explicitly makes knowledge relevant only to the subsidiary issue of whether an established violation is or is not to be characterized as "serious." The court of appeals erred both in failing to distinguish those issues, and in nonetheless implicitly resolving them against the Secretary.

3. The decision in this case reflects and perpetuates longstanding conflicts among the courts of appeals concerning the proper allocation of burdens of persuasion in enforcement proceedings under the Act.

Most courts of appeals have agreed with the Secretary and the OSHRC that "unpreventable employee misconduct" is an affirmative defense on which the employer bears the burden of proof. See *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997); *P. Gioioso & Sons* v. *OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997); *Brock* v. *L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.), cert. denied, 484 U.S. 989 (1987); *Daniel Int'l Corp.* v. *OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982); *H.B. Zachry Co.* v. *OSHRC*, 638 F.2d 812,

818 (5th Cir. 1981); see also *Danco Constr. Co.* v. *OSHRC*, 586 F.2d 1243, 1246-1247 & n.6 (8th Cir. 1978). The Third and Ninth Circuits have required employers to bear a burden of production if the Secretary makes a prima facie showing that a violation was foreseeable, but they impose the ultimate burden of persuasion on the Secretary. See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350, 357-358 (3d Cir. 1984); *Brennan* v. *OSHRC (Alsea Lumber)*, 511 F.2d 1139, 1142-1143 & n.5 (9th Cir. 1975). The Tenth Circuit has required the Secretary to prove the absence of employee misconduct. See *Capital Elec. Line Builders of Kansas, Inc.* v. *Marshall*, 678 F.2d 128, 129-130 (1982); but see *Austin Bldg. Co.* v. *OSHRC*, 647 F.2d 1063, 1068 (1981) ("[t]he employer may defend by showing that the violation was an unforeseeable occurrence."). And the Fourth Circuit, although it had previously characterized unpreventable misconduct as a "defense" (*Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1450 (1985) (en banc)), has now "reaffirm[ed]" its position that the Secretary bears the burden of proving that an employee's acts were "not unforeseeable or unpreventable." App., *infra*, 10a, 12a; see *id.* at 66a-67a (denying suggestion of rehearing en banc).

The lower courts have also adopted varying approaches to the question whether an employer knew or should have known of the existence of a violation, either as part of the Secretary's initial prima facie case or in determining whether a particular violation is properly classified as "serious" under 29 U.S.C. 666(k). The Second Circuit requires that the Secretary prove employer knowledge, but it allows the knowledge of a supervisor who commits a violation to be imputed to the employer. *New York State Elec. &*

Gas Corp. v. *Secretary of Labor*, 88 F.3d 98, 105, 109-110 (2d Cir. 1996). The Third, Fourth, and Tenth Circuits require the Secretary to prove knowledge, but do not allow her to make that showing by demonstrating a supervisor's involvement in the violation. See *Ocean Elec.*, 594 F.2d at 398-399, 403; *Pennsylvania Power*, 737 F.2d at 357-358; *Capital Elec.*, 678 F.2d at 129-130. The Sixth and Eighth Circuits require the Secretary to prove employer knowledge, and may or may not allow imputation of the knowledge of a supervisor responsible for a violation. See *Carlisle Equip. Co.* v. *United States Sec'y of Labor*, 24 F.3d 790, 792-793 (6th Cir. 1994); *L.E. Myers*, 818 F.2d at 1276-1277; *Danco*, 586 F.2d at 1246-1247. The Sixth and Ninth Circuits, like the OSHRC, have expressly required the Secretary to establish employer knowledge in order to make out a prima facie case of either a serious or a non-serious violation. See *Dunlop* v. *Rockwell Int'l*, 540 F.2d 1283, 1289-1292 (6th Cir. 1976) (but see *id.* at 1295-1296 (Edwards, J., dissenting)); *Brennan*, 511 F.2d at 1142-1145; *Secretary of Labor* v. *Prestressed Systems, Inc.*, 9 O.S.H. Cas. (BNA) 1864, 1868-1871 (OSHRC 1981). The courts, however, generally have not distinguished clearly among the requirements of the Secretary's initial prima facie case, the "unpreventable employee misconduct" defense, and the "knowledge" issue under Section 666(k); and no court has convincingly reconciled a requirement that the Secretary prove employer knowledge with the plain language of the Act.

Ten years ago, the cases in the courts of appeals already revealed a "confusing patchwork of conflicting approaches" to the related issues of employee "misconduct" and employer "knowledge" in cases under

the Act. *L.E. Myers Co.*, 484 U.S. at 990 (White & O'Connor, JJ., dissenting from denial of certiorari). Although we opposed review in *L.E. Myers* for reasons specific to that case, we agreed then that the "significant and continuing conflict" in the lower courts "[might] well require resolution by this Court." 87-246 Br. in Opp. at 7; see *id.* at 7-13 (discussing conflicting decisions, but noting that the burden-of-proof issue appeared not to have affected the court of appeals' disposition of the case).[8] Since that time, the relevant conflicts have deepened and solidified. See App., *infra*, 11a-12a; *D.A. Collins*, 117 F.3d at 695; *P. Gioioso & Sons*, 115 F.3d at 109. In our judgment, this case provides an appropriate opportunity for this Court to consider the fundamental burden-of-proof issues that arise in OSHA enforcement proceedings.

Those issues are important ones, arising in one form or another in virtually every enforcement proceeding under the Act. See *L.E. Myers Co.*, 484 U.S. at 990 (White & O'Connor, JJ., dissenting from denial of certiorari) ("the issue is central to OSHA's enforcement efforts"); *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive"). The usual confusion engendered by conflict among the circuits is, moreover, heightened in this instance because an aggrieved employer may generally seek review of an OSHRC decision in any of three circuits—where the violation occurred, where the employer is headquartered, or in the District of Columbia. 29 U.S.C.

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[8] We have provided respondent with a copy of our brief in opposition in *L.E. Myers*.

660(a); see also *id.* § 660(b) (Secretary may seek review in circuit of violation or of employer's headquarters).[9] The present state of the law in many circuits creates unjustifiable obstacles to the Secretary's enforcement of requirements designed to protect workplace safety and health; and uncertainty in the law disserves, in any event, the powerful interest in certainty and uniformity with respect to the interpretation of an Act intended to protect "every working man and woman in the Nation" (29 U.S.C. 651(b)). The questions presented here therefore warrant review and resolution by this Court.

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[9] This case, for example, involves a violation in Florida by a company headquartered in Maryland. App., *infra*, 46a-47a. The employer therefore had the option of seeking review in the Eleventh Circuit, where case law favors the Secretary; the Fourth Circuit, where case law favors the employer; or the District of Columbia Circuit, which has not clearly addressed the relevant issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1492

L.R. WILLSON AND SONS, INCORPORATED, PETITIONER

v.

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION; SECRETARY OF LABOR, RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (94-1546)

[Argued Oct. 31, 1997]
Decided Jan. 28, 1998
[Amended June 24, 1998]

Before: RUSSELL and LUTTIG, Circuit Judges, and CAMPBELL, Senior Circuit Judge of the United States Court of Appeals for the First Circuit, sitting by designation.

OPINION

RUSSELL, Circuit Judge:

L.R. Willson and Sons, Inc. ("Willson") appeals the Occupational Safety and Health Review Commission's affirmance of a citation by the Secretary of Labor (the "Secretary") for violation of the Occupa-

tional Safety and Health Act of 1970 ("the Act").[1] The Secretary issued the citation as a result of an inspection of one of Willson's construction worksites in Orlando, Florida that revealed that Willson employees were working on structural steel more than 80 feet above ground without using the "fall protective devices" mandated by 29 C.F.R. § 1926.750(b)(1)(ii).[2] An Administrative Law Judge ("ALJ") of the Occupational Safety and Health Administration ("OSHA") held an evidentiary hearing on the matter, concluded that Willson had indeed violated the regulation, and assessed a fine of $7,000. The [Occupational] Safety and Health Review Commission (the "Commission") affirmed the ALJ's findings, and this appeal followed.

Because we find that the Commission erred in placing the burden of showing the unforeseeability or preventability of the violation in question on Willson, we reverse.

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[1] 29 U.S.C. §§ 651-678 (1994).

[2] This regulation states in part that: "On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet."

I.

The inspection that resulted in the Secretary's citation took place on April 29, 1994, and was precipitated by the observations of Joseph Dear, Assistant Secretary of Labor for Occupational Safety and Health. Dear, whose room at the Peabody Hotel was across the street from Willson's worksite in Orlando, observed from his window employees on the site working without fall protection. Dear telephoned Ronald Anderson, a local OSHA "compliance officer," and told him of what he had seen, and Anderson came to make an inspection of the site. However, rather than going immediately to the Willson site, Anderson obtained permission from the Peabody Hotel to videotape the activities on the site from the hotel's roof. For approximately 50 minutes, Anderson videotaped the activities at the site, which included two employees working at a height of about 80 feet without adequate safety cables, through a "16" power camera lens. Anderson then went to the site, presented his credentials, and was allowed to interview the two employees he had observed.

During the interview and at the hearing before the ALJ, the two employees, Randall Manley ("Manley") and Donald McVay ("McVay"), admitted to violating the OSHA regulation, and Manley, who said he considered himself a foreman on the site, stated that he realized safety cables were required, but that they had not been installed on certain parts of the site. In addition, Manley stated his belief that the cables that had been installed were unsuitable.

In rebuttal, James Willson, Willson's vice president for field operations, testified that the area where

Manley and McVay were observed working without safety cables had not been opened for work, and that the two had begun work there without authorization from a supervisor. However, Willson also admitted that Manley was a "leadman" on the job, and that as such, he was responsible for making sure that his crew members observed all relevant safety regulations.

The ALJ found that Manley and McVay were working at a height of at least 75 feet without adequate protection, and that Manley's knowledge of that lack of protection was imputed to Willson as a result of Manley's supervisory authority. The ALJ also rejected Willson's defense of unforeseeable employee misconduct.

II.

Willson asserts several grounds for reversing the Commission's order. We address each in turn.

A.

Willson first claims that the ALJ erred in admitting Anderson's videotape of Manley and McVay because the tape was made in violation of the Fourth Amendment to the U.S. Constitution. Since the possible application of the Fourth Amendment's exclusionary rule to this case involves a mixed question of law and fact, we review this issue *de novo*.[3]

As Willson notes, the Fourth Amendment's protection against unreasonable searches and seizures extends to commercial property,[4] but, in addition, that

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[3] *United States v. Gastiaburo*, 16 F.3d 582, 585 (4th Cir. 1994).

[4] *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978).

protection must be premised on a "reasonable expectation of privacy."[5] Willson argues that it had such an expectation with regard to the Orlando construction site, and that therefore Anderson's warrantless observation of that site was illegal. The Commission found that there was no reasonable expectation of privacy because, "[a]nyone on the side of the [Peabody] hotel facing the Civic Center could observe the activities [on the Willson site]. . . ."[6] We agree.

Although surveillance is a type of search that can invoke Fourth Amendment protections if performed unreasonably, we hold that Anderson's long-distance observations were not unreasonable. What Anderson's tape recorded was easily observable by anyone on one of the hotel's upper stories, which seems to fall squarely within the basic Fourth Amendment principle, restated by this court in *Tarantino v. Baker*,[7] that "a person has no 'reasonable expectation of privacy' when he leaves conditions permitting a curious passerby to invade his 'private space.'"[8] In addition, in addressing a similar situation in which an OSHA compliance officer took still photographs of work at a site before actually approaching the site and requesting an inspection, the Commission held that "there is

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[5] *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[6] J.A. at 325.

[7] 825 F.2d 772 (4th Cir. 1987).

[8] *Tarantino v. Baker*, 825 F.2d 772, 776 (4th Cir. 1987) (quoting *United States v. Head*, 783 F.2d 1422 (9th Cir. 1986)). Although *Tarantino* involved a suit under 42 U.S.C. § 1983 and thus inquired into whether the constitutional rule in question was "clearly settled," its discussion of what constitutes a "reasonable expectation of privacy" is instructive.

no constitutional violation when an inspector makes observations from areas on commercial premises that are out of doors and not closed off to the public. . . ."[9]

Although, as Willson points out in its brief, the roof of the Peabody Hotel was not completely open to the public, and Anderson did employ a high powered lens in shooting the videotape, the crucial aspect of the situation seems to be that Willson left the construction site open to observation from vantages outside its control. As the inquiry should focus on what sort of "expectation of privacy" Willson had, we believe that a sustained view from a hotel across the street is difficult to classify as an unreasonable intrusion into Willson's "private space."[10] That this sustained view was enhanced by the use of a telephoto camera lens does not change this conclusion.[11] Therefore, we hold that there was no Fourth Amendment violation on

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[9] *Secretary of Labor v. Concrete Constr. Co.*, 15 O.S.H.C. 1614, 1617 (1992).

[10] *See Marshall v. Western Waterproofing Co.*, 560 F.2d 947, 950-51 (8th Cir. 1977). The *Marshall* court held that there was no Fourth Amendment violation in a case where an OSHA inspector obtained access to a private building to view adjacent repair scaffolding as "a person who exercises control over premises may consent to a search and evidence gathered in that search may be used against persons who did not consent." *Id.* at 950 (citations omitted).

[11] *See Dow Chemical v. United States*, 476 U.S. 227, 238 (1986) (EPA's use of high-powered camera lenses in aerial surveillance did not violate company's reasonable expectation of privacy because, despite the fact that "they undoubtedly give EPA more detailed information than naked-eye views," the photographs "remain limited to an outline of the facility's buildings and equipment"). Such seems to be the case here.

which to base an exclusion of the surveillance videotape.

B.

Willson also contends that the surveillance violated § 8(a) of the Act ("§ 8(a)"). Specifically, Willson argues that § 8(a) requires that an OSHA inspector present his credentials before *any* "inspection" of a "factory, plant, establishment, construction site, or other area. . . ."[12] Willson contends that this requirement extends to observations of such areas, and that the surveillance thus violated § 8(a) because Anderson did not present his credentials to the "owner, operator, or agent in charge"[13] of the Willson site. Again, we disagree with Willson's argument, and affirm the Commission's holding on this issue.

As the Commission made clear in its decision, § 8(a) is both broader and narrower in scope than the Fourth Amendment. It is broader in scope "because, even when the employer has consented to a compliance officer's entry and thus waived any protection under the Fourth Amendment, section 8(a)(2) may be violated if, for example, the on-site inspection is not conducted at reasonable times, within reasonable limits, and in a reasonable manner."[14] In addition, the Commission noted that § 8(a) is also narrower in scope than the Fourth Amendment in that it requires an *actual entry* onto a site before its protections are invoked.[15] We believe that the Commission was correct in this characterization of § 8(a).

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[12] 29 U.S.C. § 657(a)(1) (1994).

[13] *Id.* § 657(a).

[14] J.A. at 327.

[15] *Id.*

In full, § 8(a) provides that:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.[16]

The Commission, at the Secretary's urging, read § 8(a)(1) as focusing on the entrance onto a worksite, and thus concluded that it does not apply to "off-site" observations such as the one in this case. We agree.

As the legislative history of the Act makes clear, § 8(a) was designed "for government personnel to have the *right of entry* in order to ascertain the safety and health condition and status of compliance of any covered employing establishment."[17] With this purpose in mind, the legislative history indicates that §

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[16] 29 U.S.C. § 657(a) (1994).

[17] S. Rep. No. 91-1282 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5187 (emphasis added).

8(a) deals with "the inspector's presence" at a worksite, and refers exclusively to "physical inspection[s]" of such sites.[18] Nothing in the statute or its legislative history indicates that § 8(a)'s requirements apply to nontrespassory observations of worksites. In addition, as such an application would only be found despite § 8(a)'s failure to speak "to the precise question at issue,"[19] we must defer to the Secretary's clearly reasonable interpretation of that provision.[20] Therefore, we hold that Anderson's surveillance did not violate § 8(a).

C.

Further, we find without merit Willson's contention that the surveillance violated Willson's "walk-around rights"[21] under § 8(e) of the Act ("§ 8(e)").[22] Like § 8(a), § 8(e) applies to "physical inspections,"[23] of worksites, and, as a result, "walk-around rights" would also seem inapplicable to such long-distance observations. We are unpersuaded by Willson's efforts to characterize the surveillance as an "hour inspection," and are of the opinion that § 8(e) uses the term "physical inspection" carefully, intending to denote an otherwise trespassory entrance onto the

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[18] *Id.*

[19] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

[20] *Id.* at 844.

[21] "Walk-around rights" refers to the inspectee's right to have the OSHA inspector accompanied by one of the inspectee's employees during the inspection.

[22] 29 U.S.C. § 657(e) (1994).

[23] S. Rep. No. 91-1282 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5187.

inspectee's property. Thus, we find § 8(e) inapplicable to this case.

D.

Based on the foregoing, we hold that the ALJ correctly admitted the surveillance videotape into evidence.

III.

Willson next argues that the Commission incorrectly placed on Willson the burden of showing that the conduct of Manley and McVay was unforeseeable or unpreventable. Specifically, Willson takes issue with the Commission's conclusion that, because a "supervisory employee" committed the violations in question, the knowledge of those violations should be imputed to Willson, and that it was thus incumbent upon Willson to "establish that it made good faith efforts to comply with the fall protection standards."[24] Willson argues that this finding is contrary to clearly established law, and we agree.

In *Ocean Electric Corp. v. Secretary of Labor*[25] we held that, despite a finding of knowledge of the violation on the part of a supervisory employee, the Commission bore the burden of proving that the supervisory employee's acts were not unforeseeable or unpreventable.[26] In the present case, however, the Commission ignored this precedent, and, having imputed knowledge of the violation because of Manley's "Leadman" position, placed the burden of showing

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[24] J.A. at 332.

[25] 594 F.2d 396 (4th Cir. 1979).

[26] *Ocean Elec. Corp. v. Secretary of Labor*, 594 F.2d 396, 401 (4th Cir. 1979).

"good faith efforts to comply with the fall protection standards" squarely on Willson.[27] Because we find this burden-shifting in direct contravention of our rule announced in *Ocean Electric*, we reverse the Commission's decision.[28]

Although some sister circuits have held that unpreventable employee misconduct "is an affirmative defense that an employer must plead and prove,"[29] this circuit and others clearly agree that such must be disproved by the Secretary in his case-in-chief.[30] That the Secretary bears this burden is clearly the

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[27] J.A. at 332. Significantly, the improper burden-shifting complained of in *Ocean Electric* consisted of the Commission's requirement of a "showing by the employer that the supervisory employee with knowledge of the violation was himself adequately supervised with regard to safety matters." *Ocean Elec.*, 594 F.2d at 401 (citations omitted). We find this requirement substantially similar to the one at issue in this case.

[28] The Secretary contends that *Ocean Electric* should not apply here, as Manley was accompanied by McVay, who was not a supervisory employee. However, in so doing the Secretary ignores the fact that the ALJ in this case found the *prima facie* case of a violation because of *Manley's* status, and then placed on Willson the burden of rebutting with the "affirmative defense" of employee misconduct, and the Commission affirmed. J.A. at 289; 332.

[29] *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 107 (2d Cir. 1996) (holding that unforeseeability and unpreventability are affirmative defenses and citing authority from the First, Fifth, Sixth, Eighth, and Eleventh Circuits in support of this proposition).

[30] *See Ocean Elec.*, 594 F.2d at 401; *Capital Elec. Line Builders v. Marshall*, 678 F.2d 128, 129 (10th Cir. 1982); *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155 (10th Cir. 1980).

law of this circuit per *Ocean Electric*, and we see no reason to change that here.

Ocean Electric's reasoning is consistent with the clear intent of the Act.[31] Therefore, we reaffirm its application in this circuit, and hold that the Commission's burden-shifting in this case was error. Accordingly, we reverse the Commission on this ground.

IV.

Willson also argues that the $7,000 fine levied by the Secretary was excessive. However, as the Secretary notes, this allegation is procedurally barred, as 29 U.S.C. § 660(a) clearly states that, "[n]o objection that has not been urged before the Commission shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."[32] As the fine in question was clearly a part of the ALJ's order,[33] it could have been raised before the Commission but was not.[34] Therefore, having found no extraordinary circumstances to excuse this omission, we hold that the fine cannot properly be considered here.

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[31] *See Ocean Electric*, 594 F.2d at 399 (Congress clearly did not intend employer to be insurer of employee safety: rather, employers are to promote such safety "as far as possible" (quoting 29 U.S.C. § 651)).

[32] 29 U.S.C. § 660(a) (1994).

[33] J.A. at 294.

[34] In its reply brief, Willson claims that the argument in its brief before the Commission (not included in record) that the ALJ was in error "not to vacate the citation in its entirety" constitutes the presentment of the fine issue to the Commission. We disagree.

V.

Based on the foregoing, we reverse the Commission's order, and remand the case for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CAMPBELL, Senior Circuit Judge, concurring:

I agree with the court's able opinion, but, in respect to the determinative issue, I limit my agreement to the fact that *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979), is controlling precedent in this Circuit and appears in these circumstances to be correctly applied in accordance with its terms. As a visitor, I see no occasion to decide, and do not decide, whether, as the opinion states, "*Ocean Electric*'s reasoning is consistent with the clear intent of the Act" and whether it is desirable to "reaffirm its application in this circuit."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1492
94-1546

L. R. WILLSON AND SONS, INCORPORATED, PETITIONER,

v.

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION; SECRETARY OF LABOR RESPONDENTS

[Filed: June 19, 1998]

ORDER

The Secretary of Labor has filed an unopposed motion to amend caption to add the Secretary as a party-respondent.

The Court grants the motion to amend caption and the Secretary of Labor is added as a party-respondent.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX C

[SEAL OMITTED]

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1120 20TH STREET, N.W., NINTH FLOOR
WASHINGTON, DC 20036-3419

OSHRC Docket No. 94-1546

SECRETARY OF LABOR, COMPLAINANT

v.

L.R. WILLSON AND SONS, INC., RESPONDENT

DECISION

Before: WEISBERG, Chairman; MONTOYA, and GUTTMAN, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration ("OSHA") issued a citation alleging that L.R. Willson and Sons, Inc. (Willson") committed a willful violation of the OSHA fall protection standards governing construction work. Willson contested the citation, and a hearing was held before Administrative Law Judge Nancy J. Spies, who affirmed the citation but characterized the violation as serious rather than willful.

At issue on review are Willson's arguments that the manner in which the inspection was conducted violated both the Fourth Amendment of the Constitution of the United States and section 8(a) of the Act, 29 U.S.C. § 657(a), and the Secretary's argument that the violation should have been characterized as willful. Oral argument was held on whether the compliance officer's actions contravened any requirements of the Fourth Amendment or section 8(a).[1] For the reasons below, we affirm the judge.

Background.

Willson, a steel erection contractor based in Maryland, was a subcontractor on the renovation of the Orange County Civic Center in Orlando, Florida, a building covering approximately 3,000,000 square feet. The inspection that led to the citation resulted from a telephone call to the local OSHA office by Joseph A. Dear, then Assistant Secretary of Labor for Occupational Safety and Health, who was staying at a hotel across the street from the Civic Center. From his hotel room, Assistant Secretary Dear observed individuals working without fall protection at a height of approximately 80 feet.

As a result of this phone call, a compliance officer was sent to investigate. Before going to the worksite, the compliance officer went to the hotel, where he got permission to go to the hotel's roof accompanied by a hotel security officer. For approximately 50 minutes, using a video camera with a 16-power zoom lens, the

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[1] Because of the similarity of the issues presented, the Commission heard oral argument in this case and in *Regional Scaffolding and Hoisting Co., Inc.*, No. 93-577, on the same day.

compliance officer videotaped two individuals without fall protection working on structural steel beams approximately 80 feet above the ground. When he finished videotaping the employees, the compliance officer went to the worksite, where he presented his credentials to representatives of the general contractor and the steel erection prime contractor, who then gathered representatives of Willson and the other steel erection subcontractor. Eventually it was determined that the two individuals the compliance officer had videotaped were Willson employees and that one of them was a foreman. When the employees were called to the meeting, they admitted their activities. Based on the compliance officer's observations and the employees' admissions, OSHA cited Willson for a willful violation of fall protection standards. At the hearing, the videotape was introduced into evidence, and the compliance officer admitted that all of his observations of the violative conduct had been made through the viewfinder of the video camera. Based on the videotape, the compliance officer's testimony, and the evidence given by other witnesses, the judge found a serious but not willful violation.

On review, Willson argues that, because the compliance officer did not give Willson any notice that he was observing and videotaping the activities of its employees before he entered the worksite, his observation of its worksite without notice violated both the Fourth Amendment and section 8(a) of the Act.

The Fourth Amendment.

The Supreme Court has held that the Fourth Amendment to the Constitution requires the Secretary to obtain a warrant in order to conduct an inspection without the consent of the employer whose

workplace is being inspected.[2] *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). However, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). "What is observable by the public is observable without a warrant by the Government inspector as well." *Marshall v. Barlow's, Inc.*, 436 U.S. at 315.[3] The Fourth Amendment protects against intrusions only into areas where an individual has a reasonable expectation of privacy.

Whether there is a reasonable expectation of privacy is not necessarily determined by the location from which the observations are made. For example, police observations of a drug transaction taking place

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[2] The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[3] Although the judge correctly found the videotape admissible, she relied on the "open fields" doctrine under the Fourth Amendment. As the Supreme Court noted in *Oliver v. United States*, 446 U.S. 170, 175 n.5 (1984), the open fields doctrine has generated confusion. The Court stated that the term "open fields" "may include any unoccupied or undeveloped area outside of the curtilage," and explained that "[a]n open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example, . . . a thickly wooded area . . . may be an open field as that term is used in construing the Fourth Amendment." *Id.* at 180 n.11; *see also, Dow Chemical Co. v. United States*, 476 U.S. 227, 236 (1986). In view of our conclusion below that Willson had no reasonable expectation of privacy in the activities at issue, we need not decide here whether the "open fields" doctrine is properly applicable.

on a public sidewalk, made from private property, are permissible because the participants in the transaction have no reasonable expectation of privacy for their conduct in such a location. *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981) (observations with binoculars from undisclosed surveillance location of activities taking place in public view gave police probable cause to arrest). The same principle controls the situation in this case. Although some of the compliance officer's observations may have been made from a location that was not accessible to the general public, the part of this worksite where the employees were observed walking the steel beams without fall protection was open to public view. Anyone on the side of the hotel facing the Civic Center could observe the activities, as well as the occupants of any other buildings within eyeshot and passersby on the street. We therefore conclude that Willson cannot claim that it had a "'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Accordingly, we find no violation of the Fourth Amendment.[4]

Section 8(a) of the Act.

The parties dispute whether section 8(a) of the Act prohibits the kind of conduct involved here, extended

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[4] We take issue with our concurring colleague's conclusion that our decision here leaves employers with no relief from "covert inspections." While, as we hold below, section 8(a) of the Act does not apply to off-site observations, the requirements of the Fourth Amendment do apply to such conduct. Accordingly, where the actions of an OSHA compliance officer violate an employer's reasonable expectation of privacy, the employer will find solace in the Constitution.

observations made from a location removed from the worksite. In determining what a statute requires or prohibits, we must start with the language of the statute itself. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Here, section 8(a) provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

In the Secretary's view, the requirements of section 8(a) are coextensive with those of the Fourth Amendment, and section 8(a) is not violated when, as we have held in this case, there has been no violation of the Fourth Amendment. In *Marshall v. Barlow's, Inc.*, the Supreme Court rejected the Secretary's argument that Congress had intended for section 8(a) to permit an OSHA compliance officer to enter a worksite and conduct a search without either a warrant or its equivalent (*e.g.*, consent). Today we

state explicitly what has been implicit in our recent decisions: the provisions of section 8(a) are not coextensive with those of the Fourth Amendment.[5] Section 8 is both broader and narrower than the Fourth Amendment in its application. Section 8(a) is broader than the Fourth Amendment because, even when the employer has consented to a compliance officer's entry and thus waived any protection under the Fourth Amendment, section 8(a)(2) may be violated if, for example, the on-site inspection is not conducted at reasonable times, within reasonable limits, and in a reasonable manner. It is narrower because it applies only to physical inspections on the worksite, while the Fourth Amendment may apply to an off-site observation.[6] We reach this conclusion

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[5] *See, e.g., GEM Indus., Inc.*, 17 BNA OSHC 1184, 1993-95 CCH OSHD ¶ 30,762 (No. 93-1122, 1995); *Hamilton Fixture*, 16 BNA OSHC 1073, 1078, 1993-95 CCH OSHD ¶ 30,034, p. 41,173 (No. 88-1720, 1993) (waiver of Fourth Amendment right to require a warrant by consenting to inspection does not preclude 8(a) defense), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994); *Adams Steel Erec., Inc.*, 13 BNA OSHC 1073, 1076, 1079, 1986-87 CCH OSHD ¶ 27,815, pp. 36,401, 36,403 (No. 77-3804, 1987). To the extent that *Laclede Gas Co.*, 7 BNA OSHC 1874, 1877, 1979 CCH OSHD ¶ 24,007, p. 29,153 (No. 76-3241, 1979), is inconsistent with this holding, it is overruled.

[6] *E.g., United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980) (observation of premises through telescope from apartment across the street with direct line of sight is a search to the extent that objects could not be seen by naked eye); *United States v. Kim*, 415 F. Supp. 1252 (D. Ha. 1976) (telescope approximately quarter-mile from apartment); *Katz v. United States*, 389 U.S. 347 (1967) (electronic listening device attached to exterior of telephone booth); *see also United States v. Karo*, 468 U.S. 705 (1984) (monitoring from remote location of beeper inside can in home is a search).

based on the plain language of section 8(a).[7] By its terms, section 8(a) authorizes the Secretary, upon presentation of credentials, (1) to enter a workplace, *and* (2) to inspect it, in that order. The introductory clause in section 8 applies to both sections 8(a)(1) and 8(a)(2), which are joined by the conjunctive "and." The sequence in which §§ 8(a)(1) & (2) appear leads us to conclude that Congress contemplated that the Secretary would present his credentials, then enter the worksite, then conduct the inspection.[8] Therefore, we conclude that section 8(a) did not preclude the compliance officer in this case from observing the cited conditions from a location off the worksite before he presented his credentials and entered the worksite to conduct the inspection. Nor did the statute require the compliance officer to enter the premises "without delay" and present his credentials. The statute simply *authorizes* the compliance officer, subject to Fourth Amendment limitations set out in *Barlow's*, to enter the worksite without delay after he has presented his credentials. Thus, the requirement

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[7] We note that, at oral argument, counsel for Willson could cite no language in the Act or its legislative history indicating that section 8(a) was intended to apply to off-site observations.

[8] Indeed, although section 8(a)(2) refers to both inspections and investigations, and our concurring colleague would not limit 8(a) to activities occurring onsite, she provides no guidance as to what, if any, off-site investigation she would permit prior to the presentation of credentials. It is unclear, for example, whether she would permit OSHA to examine photographs of conditions at a workplace brought to it by an employee making a complaint, and if so, on what legal basis under 8(a) she would draw this distinction. Moreover, the concurrence fails to identify the principles that would distinguish a putatively unlawful section 8 off-site inspection from an unlawful search under the Fourth Amendment.

in section 8(a)(1) that the compliance officer present his credentials before commencing an inspection applies only to physical inspections on the worksite.[9]

Like our colleague, we are troubled by the compliance officer's conduct in this case. However, we find nothing in the statute or in the case law to suggest that section 8(a) applies to off-site investigations. Our concurring colleague's reliance on *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), is misplaced. In *Dow*, the company contended, *inter alia*, that the Environmental Protection Agency was precluded from aerial surveillance and photography of its industrial complex by section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a), which has wording similar to that in section 8(a). Dow argued that the language in section 114(a) requiring the presentation of credentials before entry on the premises limited EPA's authority to conduct unannounced aerial observation. Because the Court found that section 114(a) *did not limit* off-site observation of the workplace, our colleague jumps to the conclusion that the Court found that section 114(a) "*authorized*" such observations. She then states that the Court "must have considered" aerial photography to be an "inspection" encompassed by section 114(a) and subject to its requirements (e.g., the presentation of credentials). Accordingly, she infers that off-site observation and

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[9] In light of our conclusion that there was no violation of either the Fourth Amendment or section 8(a) of the Act, we need not determine whether it is appropriate to require an employer to show actual prejudice before a remedy will be afforded, or to decide what remedy would be appropriate for an intentional violation of section 8(a).

investigation by OSHA are also restricted by the similar provisions of section 8(a) of the OSH Act.

To the contrary, the Court appears to have reached precisely the same conclusion with respect to section 114(a) as we reach today regarding section 8(a). After stating that regulatory or enforcement authority "carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted," 476 U.S. at 233, the Court went on to find that there was no "suggestion in the statute that the powers conferred by this section [114(a)] are intended to be exclusive." 476 U.S. at 234. Hence, while noting that as a grant of a right of entry section 114(a) "appears to expand, not restrict, EPA's general powers to investigate," the Court went on to find that EPA, "as a regulatory and enforcement agency, *needs no explicit statutory provision* to employ methods of observation commonly available to the public at large" such as the aerial observation in question. *Id.* (emphasis added). Similarly, we find today that while section 8(a) is a grant of authority to OSHA for entry onto the work site under specified limitations, it does not encompass or define such other investigatory powers as OSHA may possess by virtue of its statutory regulatory authority.

Willson argues, *inter alia*, that the compliance officer's conduct violated the reasonableness requirement of section 8(a)(2) by videotaping the employees for 50 minutes while they were exposed to an 80-foot fall, instead of proceeding immediately to the worksite and ending the hazard. While this activity does not fall within the letter of section 8(a) because it took place off the worksite, it does cause us great concern.

We do not consider it a desirable practice to leave employees exposed to potentially fatal hazards for the sake of further documenting a violation. Having identified the violation specified in the complaint and recorded it, the compliance officer nonetheless allowed the employees to continue being exposed to a fall of 80 feet for an additional 45 minutes while he videotaped their activities.[10] The compliance officer's first duty was to the safety of the employees, but he allowed them to remain exposed to a serious fall hazard for close to an hour before he went to the worksite and halted the practice. It is fortunate that neither of the ironworkers fell while the compliance officer videotaped. In our view, this type of delay is contrary to the very purposes of the Act, making the workplace safer, and we urge the Secretary to take steps to prevent it in the future.[11]

At oral argument, the Secretary defended the compliance officer's conduct by asserting that it is within the Secretary's discretion to determine the appropriate balance between collecting evidence of violations and the immediate elimination of unsafe situations. We agree. However, there is nothing in the record that shows that the Secretary has exer-

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[10] At the hearing, only the first few minutes of the videotape were played before the judge indicated that she had seen all she needed to see. We have viewed the tape and find nothing in the last 40 minutes or so that adds to the Secretary's case.

[11] Even if it were shown that the compliance officer's actions violated the Secretary's explicit written instructions governing the conduct of an inspection, it would not afford the employer a remedy, because OSHA's internal procedural manuals do not give substantive rights to an employer. *Andrew Catapano Ent.*, 17 BNA OSHC 1776, 1780, 1996 CCH OSHD ¶ 31,180, p. 43,604 (No. 90-50, 1996) (consolidated).

cised her discretion by, for example, instructing compliance officers on the factors to be weighed when documenting an ongoing serious violation. In response to questioning at oral argument, the Secretary submitted excerpts from OSHA's Field Inspection Reference Manual showing that she has instructed compliance officers to proceed to the worksite as rapidly as possible in the case of an imminent danger. However, since the circumstances here were not characterized as an "imminent danger" under Section 13 of the Act, 29 U.S.C. § 662, such instructions do not apply. In short, there is nothing in the record to show that the Secretary has considered the question in regard to those circumstances where imminent danger is not presented, much less provided guidance to compliance officers regarding such situations.

We do not endorse the course of action followed by the compliance officer here or the Secretary's apparent failure to give guidance to her compliance officers. We urge the Secretary to address this issue.

Willfulness.

The Secretary alleged that the violation was willful. The judge found that it was serious but not willful. Having examined the facts and circumstances of the violation in light of the legal test for willfulness, we affirm the judge's decision.

> The Commission has described a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991 CCH OSHD ¶ 29,223, p. 39,133 (No. 85-0369, 1991).

> *See Babcock & Willcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980); *Frank Irey, Jr. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1974). A willful violation is differentiated from others by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, i.e., conscious disregard or plain indifference for the safety and health of employees.

Falcon Steel Co., 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHD ¶ 30,059, p. 41,330 (No. 89-2883, 1993). In establishing that an employer knew of the Act's requirements and knowingly disregarded them, the knowledge and conduct of a supervisory employee may be imputed to the employer for purposes of finding that the violation was willful. *Conie Constr. Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,089 (No. 92-264, 1994), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995). Thus, willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875, 1993-95 CCH OSHD ¶ 30,485, p. 42,109-10 (No. 91-1167, 1994). However, a good faith effort to comply with a standard or eliminate a hazard, even though the effort is not entirely effective or complete, may constitute a defense to willfulness. *Id.*; *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one—whether the employer's belief concerning a factual matter or concerning the interpretation of a rule was reasonable under the circumstances. *Id.*, 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591.

The Secretary has established that a supervisory employee knowingly violated the fall protection standards. One of the employees observed by the compliance officer held the job title of foreman, and he admitted that he knew he was violating both Willson's rules and the OSHA standards.[12] This knowing disregard for the requirements of the Act by a supervisory employee may appropriately be imputed to Willson for purposes of establishing a willful violation. *V.I.P. Structures, Inc.*, 16 BNA OSHC at 1875, 1993-95 CCH OSHD at p. 42,109-10. Therefore, to avoid a finding of willfulness, Willson must establish that it made good faith efforts to comply with the fall protection standards.[13]

Willson had an excellent safety program that focussed on the use of fall protection. Because the contract required that 90 per cent of its employees on the job be hired locally, Willson had to use iron-

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[12] Willson's vice president, Jim Willson, testified that, although the employee was called a foreman, he was paid the same wage as regular ironworkers and functioned more as a leadman or crew leader than as a foreman. That evidence is not dispositive, because an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *John H. Quinlan*, 17 BNA OSHC 1194, 1196 n.2, 1993-95 CCH OSHD ¶ 30,749, p. 42,715 n.2 (No. 92-756, 1995).

[13] Willson has argued that a major factor in the decision to allege that this was a willful violation was that it was initiated by the Assistant Secretary and that OSHA has put forth a number of different reasons why the violation was willful, subsequently admitting that some of them were unsupported. Those arguments miss the point. We look at the facts in the record and determine whether they fit within the legal framework of a willful violation.

workers who had not previously gone through its general training program, so it sent its newly-hired employees to a school in the area that was conducted by the Associated Builders and Contractors. Willson also put its new employees through the general contractor's safety training program and its own safety training. In addition, Willson's insurance carrier conducted safety training for its employees on the site and outside safety consultants were brought in to instruct the employees. Willson also held safety meetings at least once a week, and the use of fall protection was always stressed. The project safety manager, who was called to testify by the Secretary, stated that Willson is a safe steel erection company, that it is interested in safety, and that it has an effective safety program. The compliance officer testified that very few steel erection companies have a better written safety program than Willson. OSHA's area director agreed that Willson's safety program was adequately communicated to its employees. His only reservation was whether that program was sufficiently enforced.[14]

Willson had a progressive system of discipline beginning with oral warnings and reprimands, progressing to written reprimands, and concluding with firing. The foreman observed by the compliance officer testified, "We knew it was 100-percent tie-off

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[14] This reservation was the reason the judge found that the unpreventable employee misconduct affirmative defense to the underlying violation was not proved. The failure to prove this defense to the violation, however, does not preclude the employer from establishing the good faith defense to a willful characterization of the violation.

on the job,"[15] and said that employees were given oral reprimands "all the time." The foreman knew of two Willson employees who had been warned that they would be fired if they committed another violation. On this job, Willson had issued at least three written reprimands to employees for not using proper fall protection, and it had fired employees for safety violations. In addition, Mr. Willson, the company's highest official at the site, testified that he had instructed the two employees in question to complete the work on the level where they had previously been working and had explicitly told them not to go into the area where the compliance officer saw them until safety cable to which employees could hook their lanyards had been strung in that area.[16]

We recognize that, despite Willson's safety program, the violation not only occurred but went undetected for nearly an hour. This apparently happened because Mr. Willson had gathered all of Willson's supervisory employees in the company's office trailer to give them final instructions before he returned to Maryland that afternoon. Although, according to the compliance officer, the employees videotaped could be seen from the ground, they were not visible from the area of Willson's trailer.

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[15] He even told the employee who was with him at the time the compliance officer observed them to tie off, and the videotape does show that, although he did not tie off, the other employee stayed mostly in one location while the foreman walked around on the beams without fall protection.

[16] Safety cable had been erected in other work areas and was supposed to have been installed in the area in question, but the crane could not get to a location where it could hoist the cable because trucks delivering construction supplies were blocking the way.

The individuals involved knew they were violating company rules and knew the consequences. In fact, the foreman had requested the day before that safety cables be erected in this area so that his crew could begin working there. By his own admission, the foreman disregarded Mr. Willson's specific instructions. Although Willson should have supervised its employees more closely, the record shows that Willson made a reasonable good faith effort to comply with the standard. As was the case in *Chesapeake Operating Co.*, 10 BNA OSHC 1790, 1795, 1982 CCH OSHD ¶ 26,142, p. 32,918 (No. 78-1353, 1982), the conduct here was untypical of Willson's supervisory personnel. We therefore conclude that Willson's good faith efforts in enforcing its safety rules were sufficient to support a finding that the violation was not willful.

Penalty.

The judge found the violation serious and assessed a penalty of $7,000, the maximum permissible for a serious violation under the Act. On review, Willson has not challenged the penalty assessed by the judge, and we agree that the judge properly assessed the maximum because of the high gravity of the violation. Although only two employees were exposed, this violation continued for a long period of time—the compliance officer videotaped for 50 minutes—and the height at which the employees were observed made it probable that any accident would be fatal. In view of all the facts, we find a penalty of $7,000 to be appropriate.

Order.

For the reasons given, we conclude that the inspection did not violate either the Fourth Amendment to the Constitution or section 8(a) of the Act. We agree

with the judge that the violation was correctly characterized as serious rather than willful, and that a penalty of $7,000 is appropriate.

/s/ STUART E. WEISBERG
STUART E. WEISBERG
Chairman

/s/ DANIEL GUTTMAN
DANIEL GUTTMAN
Commissioner

Dated: March 11, 1997

MONTOYA, Commissioner, concurring:

By its decision today, the majority has cleared the way for OSHA to conduct its inspections by stakeout. I concur with their conclusion that L.R. Willson and Sons, Inc. ("Willson") has no interest in privacy that is protected under current Fourth Amendment law. I strongly disagree, however, with their conclusion that the kind of surveillance activity engaged in by the compliance officer here is permissible under sections 8(a) and 8(e) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657(a) and (e). On the authority of these sections, I would suppress the evidence this compliance officer gained through covert surveillance of Willson's worksite. However, I consider the compliance officer's observations from the worksite itself, and the admissions made by Willson's employees, sufficient to support both the violation found by the majority and their penalty assessment. I therefore agree with their ultimate decision to affirm Judge Spies' disposition of this citation.

Because the Fourth Amendment provides no remedy for the covert surveillance the compliance officer conducted of Willson's worksite, then any remedy available to Willson must lie in section 8 of the OSH Act. The Secretary has argued that the provisions of section 8 are coextensive with those of the Fourth Amendment—that section 8 provides no remedies beyond those recognized under the Fourth Amendment. Though the majority has rightly rejected that view, I do not agree with their rationale. Indeed, I consider the majority's conclusion that section 8 protections are at once "broader" than those of the Fourth Amendment, yet "narrower" for the single purpose of

exempting off-site inspections, to be a result-driven "gerrymander" of the most obvious sort. In my opinion, Congress intended that these protections should be broader than those of the Fourth Amendment for *all* purposes.

The Commission has already determined that section 8(a)(1) guarantees employers that inspections will be conducted at "reasonable times, and within reasonable limits, and in a reasonable manner." When OSHA deliberately violates these guarantees, then the Commission can apply an appropriate sanction. *See Hamilton Fixture*, 16 BNA OSHC 1073, 1078, 1993 CCH OSHD ¶ 30,034, p. 41,173 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994). It is only reasonable, then, that an equivalent sanction is available when OSHA deliberately violates the rights guaranteed in sections 8(a) and 8(e). Therefore, if an OSHA compliance officer enters a worksite and deliberately conducts an inspection without first "presenting appropriate credentials to the owner, operator, or agent in charge," as required by section 8(a), some remedy must be available to an employer. Also, some remedy must be available if "a representative of the employer and a representative authorized by his employees" is not "given an opportunity to accompany" the OSHA compliance officials, as required by 8(e) (known generally as "walkaround rights").

In my opinion, the compliance officer here intentionally violated both of these provisions when he began his inspection by conducting surveillance of the worksite for the purpose of documenting violative conduct. As the Supreme Court has recognized in the Fourth Amendment context, a search does not nec-

essarily involve "a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. 347 353 (1967). *See also United States v. Knotts*, 460 U.S. 276 (1983) (approving surveillance of driver of automobile by police using beepers, automobiles and helicopter); and *United States v. Conner*, 478 F.2d 1320 (7th Cir. 1973) (approving observations made by police from end of alley through open garage door into automobile repair shop). In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the Supreme Court analyzed the inspection provisions in section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a), and explicitly held that "the use of aerial observation and photography is within EPA's statutory authority." 476 U.S. at 232. For the Court to have made this holding, it must have considered that the Environmental Protection Agency was engaged in an inspection when it photographed Dow's plant from a remote location.[17] Since the operative provisions of section 114 of the Clean Air Act read much like those of section 8 of the OSH Act, I can only conclude that this compliance officer was likewise engaged in an inspection when he gathered evidence from the roof of the hotel. This inspection was commenced in deliberate violation of the requirements of sections 8(a) and 8(e).

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[17] As with the compliance officer in this case, the Environmental Protection Administration officials in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) presented no creditials before beginning a remote surveillance. Unlike this case, however, *Dow* was decided on Fourth Amendment grounds alone. The majority's reading of *Dow* notwithstanding, the Court offered no opinion as to whether the inspection provisions of section 114(a), 42 U.S.C. § 7414(a), provide protections beyond those of the Fourth Amendment.

This does not mean that all observations made by compliance officers before they present credentials or provide walkaround rights are subject to sanction. As the Commission has recently recognized, incidental observations made while a compliance officer is approaching a worksite do not offend the provisions of section 8 of the Act. *See GEM Indus., Inc.*, 17 BNA OSHC 1184, 1186-87, 1993-95 CCH OSHD ¶ 30,762, pp. 42,746-47 (No. 93-1122, 1995). However, unlike the compliance officer in *GEM*, this compliance officer deliberately concealed himself for a protracted time at a remote location for the single purpose of documenting violative conduct. Again, such surveillance can only be considered part of an inspection within the meaning of section 8. And, since this part of the inspection was conducted prior to the presentation of credentials as required by section 8(a), with no opportunity for Willson or its employees to exercise walkaround rights provided in section 8(e), some sanction must be applied.

The majority could have decided this case on the testimony of Willson's employees without reaching any of these section 8 issues. Nonetheless, they have gratuitously concluded that the protections provided by section 8 are generally broader than those of the Fourth Amendment. In doing so, however, they have conveniently found a narrowing of section 8 regarding off-site inspections, thereby denying employers any remedy when OSHA conducts off-site surveillance such as here. Though they claim to find this narrowing in the language of section 8 itself, the courts have found no such limitation in the Fourth Amendment, nor in the closely-related inspection provisions of the Clean Air Act. Indeed, section 8(b) gives OSHA the

authority to subpoena witnesses in the furtherance of an inspection. By enacting this provision, Congress clearly intended that section 8 would apply to inspection activity that would occur off-site. Having now eliminated the only basis on which an employer can seek relief from a covert inspection, there is little solace to employers in the majority's lengthy criticism of OSHA's inspection policy. Congress did not give the Commission oversight authority to affect OSHA's internal policies, but rather "intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* ...." (emphasis in original). *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 154 (1991).

The Commission has determined that the exclusionary rule applies to its proceedings. *Sanders Lead Co.*, 15 BNA OSHC 1640,1651, 1991-93 CCH OSHD ¶ 29,690, p. 40,270 (No. 87-0260, 1992). While the Circuit Courts have agreed, they have also said that the good faith exception should be liberally applied when considering orders of abatement. *Trinity Industries v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994); *Smith Steel Casting v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986). Given the compliance officer's deliberate violation of section 8, I can see no reason to give the Secretary the benefit of the good faith exception here. I would therefore apply the sanction of suppression to all evidence gathered by the compliance officer as a result of his surveillance from the roof of the hotel across the street from the worksite. However, as the majority opinion states, following his proper presentation of credentials at the worksite, the compliance officer did obtain additional evidence to support the citation. Together with the hearing testimony, I

have concluded that this evidence alone supports the alleged violation.

The Secretary argues that *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991) require the Commission to give deference to his reading of section 8. It is true that the Supreme Court has said that when the Commission finds an OSHA standard to be ambiguous, then it, like all reviewing courts, must give deference to the Secretary's reasonable interpretation of that standard. However, the *CF&I Steel* Court was careful to explain that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policy making prerogatives, the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Id.* at 151. This reasoning certainly applies when the Commission is confronted with an ambiguity in a standard promulgated by the Secretary. But that is not the case here. What we are now asked to determine is what—if any—legal remedy should be afforded to an employer when OSHA intentionally violates section 8 of the OSH Act. Like OSHA, the Commission is itself an agency established under the OSH Act. Repeating the words of *CF&I Steel*, "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court*. . . ." *CF&I Steel*, 499 at 154 (emphasis in original). The issue here—whether the exclusionary rule and its suppression remedy apply when the Secretary intentionally violates section 8 of the OSH Act—must be decided in accordance with rules of

evidence created by the courts. As the Commission is the agency with the "adjudicatory powers typically exercised by a court," then the most logical application of *Chevron* and *CF&I Steel* would be to give deference to the Commission, not the Secretary, on such a purely legal decision as this.

The Secretary has cited a number of cases under section 8 for the proposition that the employer must show actual prejudice in order for section 8 sanctions to apply. All of those cases, however, involve unintended "technical violations" of section 8 by OSHA personnel. Here the compliance officer deliberately avoided his statutory duty to present his credentials and to allow the employer and the employees to participate in the inspection. In a case such as this, it can easily be said that the employer was prejudiced *per se*, and it is hardly appropriate to require the employer to show actual prejudice for a sanction to apply. The Secretary's unsupported representation at oral argument that she now has administrative controls in place to prevent the improper conduct of inspections provides little reassurance. Particularly considering that the Secretary has refused to acknowledge that the OSH Act places any limitations on her inspection authority, the license the majority now has given her to support citations with evidence gathered secretly from off-site is cause for concern.

Conclusion.

For the reasons stated, I concur in the result reached by the majority, although I arrive at this result by a different course of reasoning.

/s/ VELMA MONTOYA
VELMA MONTOYA
Commissioner

Dated: March 11, 1997

APPENDIX D

[SEAL OMITTED]

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OSHRC Docket No. 94-1546

SECRETARY OF LABOR, COMPLAINANT

v.

L. R. WILLSON AND SONS, INC., RESPONDENT

DIRECTION FOR REVIEW

The Respondent has filed a Petition for Discretionary Review. Pursuant to 29 U.S.C. § 661 (j) and 29 C.F.R. § 2200.92(a), the decision of the Administrative Law Judge is directed for review. Based on a preliminary examination of the record, the issue to be considered is:

1) Given that Compliance Officer Anderson made the subject video tape of Respondent's worksite from a non-public area on the roof of the Peabody Hotel, and with the aid of a 16 power lens, did the judge err in admitting the video tape and the ensuing testimony regarding what was allegedly seen through the video camera?

A briefing order will follow that may designate additional issues.

/s/ VELMA MONTOYA
VELMA MONTOYA
Commissioner

DATED: 6/29/95

[SEAL OMITTED]

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OSHRC Docket No. 94-1546

SECRETARY OF LABOR, COMPLAINANT

v.

L. R. WILLSON AND SONS, INC., RESPONDENT

DIRECTION FOR REVIEW

Subsequent to Commissioner Montoya's direction for review of the Administrative Law Judge's decision in this case based on the Respondent's Petition for Discretionary Review, the Secretary filed a Petition for Discretionary Review. While concurring with Commissioner Montoya's direction, pursuant to 29 U.S.C. §§ 661 (j) and 29 C.F.R. § 2200.92(a), I would also direct review on the following issue raised by the Secretary:

> Did the judge err in reducing the classification of the alleged violation of §1926.750(b)(1)(ii) from willful to serious?

A briefing order will follow that may designate additional issues.

/s/ STUART E. WEISBERG
STUART E. WEISBERG
Chairman

DATED: June 30, 1995

APPENDIX E

[SEAL OMITTED]

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OSHRC Docket No. 94-1546

SECRETARY OF LABOR, COMPLAINANT

v.

L. R. WILLSON AND SONS, INC., RESPONDENT

Appearances:

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U.S. Department of Labor
Atlanta, Georgia
For Complainant

Frank L. Kollman, Esq.
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Baltimore, Maryland
For Respondent

DECISION AND ORDER

Before: Administrative Law Judge NANCY J. SPIES.

L. R. Willson and Sons, Inc. (Willson), contests a citation issued by the Secretary on May 12, 1994. The citation resulted from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Ron Anderson on April 29, 1994. The Secretary alleges in the citation that Willson committed a willful violation of §1926.750(b)(1)(ii), or, in the alternative, of §1926.105(a), by failing to require two of its employees to use fall protection while they were working approximately 80 feet above the ground.

FACTS

The relevant facts are not in dispute. Willson operates a steel erection business headquartered in Gambrills, Maryland (Tr. 142). In the first part of 1994, Willson was working as a subcontractor on the renovation of the Orange County Civic Center (Center) in Orlando, Florida. The project was quite expansive, covering approximately 3,000,000 square feet, and constituting one of the largest such projects in the Southeast (Tr. 8-9). The general contractor on the project was C.R.S.S./Kelsey/Hardin (CKH) (Tr. 122). CKH had contracted with Addison Steel, who acted as the steel fabricator and supplier on the project. Addison Steel subcontracted the steel erection work to Willson (Tr. 41).

In February 1994, Anderson conducted a comprehensive inspection of the Center, in response to a complaint (Tr. 71-72). The Secretary cited Willson for, among other things, a violation of

§ 1926.750(b)(2)(i)[1] as a result of that inspection. Anderson had observed a Willson ironworker working approximately 30 feet above the ground without using fall protection. During an informal conference regarding the citation, Willson produced three written warnings it had issued to employees as evidence that Willson disciplined employees for safety infractions. This documentation convinced the Secretary that the fall protection violation was the result of unpreventable employee misconduct. Within the terms of an overall settlement, the Secretary withdrew the item alleging the § 1926.750(b)(2)(i) violation (Exh. C-3; Tr. 20-21, 50).

Anderson returned to the Center on April 29, 1994, in response to a referral alleging that unidentified workers had been observed working without fall protection at a height of approximately 80 feet. The referral was unusual in that it came from Joe Dear, the assistant Secretary of Labor (Tr. 7). Dear had earlier observed the employees from his hotel room in the Peabody Hotel, directly across the street from the Center (Tr. 103-104).

Anderson went first to the Peabody Hotel with a video camera. He met with the hotel's director of safety and received permission to videotape the construction activity at the Center from the roof of the Peabody Hotel. After gaining access to the hotel's

---

[1] § 1926.750(b)(2)(i) provides:

> Where skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed, ... Where such a floor is not practicable, paragraph (b)(1)(ii) of this section applies.

roof, Anderson videotaped various workers at the Center for approximately 50 minutes. Anderson had the camera's zoom lens set on its maximum 16-power (Tr. 9). Anderson testified that without the zoom lens, he "could not really make anything out in detail" (Tr. 72).

Anderson videotaped two ironworkers who were working on the steel with no fall protection. He estimated that they were 80 feet above the ground (Tr. 9). Anderson went over to the Center and held an opening conference with Bill Smelcer of CKH. Anderson ultimately met with the two employees he had videotaped working without fall protection. They were Randall (Randy) Manley and Donald McVay, both employees of Willson (Tr. 13-15). They admitted to Anderson that they were working without fall protection despite Willson's policy of tying off at all times at elevations above 10 feet (Tr. 15-16).

ADMISSIBILITY OF VIDEOTAPE

At the hearing, Willson objected to the admissibility of the videotape on the grounds that the videotape resulted from an illegal search conducted by Anderson. Willson argues that Anderson made the videotape before he held an opening conference with Willson in derogation of §8(a) of the Act, and that the area and activity videotaped by Anderson were not in plain view. The Secretary responded that the area and activity videotaped by Anderson were in plain view from the roof of the Peabody Hotel, where Anderson had a right to be. The undersigned deferred ruling on Willson's objection (Tr. 31-32), and now rules that the videotape, Exhibit C-4, is admissible.

Section 8(a) of the Act provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Willson argues that Anderson failed to comply with §8(a) when he waited until after he had videotaped Willson's worksite before presenting his credentials to CKH and Willson.

> The Commission has held that an employer's right under section 8(a) to have the OSHA representative present credentials prior to the inspection is not violated unless a violation of the Fourth Amendment is also shown. *E.g.*, *Laclede Gas Co.*, 7 BNA OSHC 1874, 1877, 1979 CCH OSHD ¶ 24,007, p. 29,153 (No. 76-3241); *Accu-Namics, Inc.*, 1 BNA OSHC 1751, 1755, 1973-74 CCH OSHD ¶ 17,936, p. 22,233 (No. 477, 1974), *aff'd*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *see Concrete Constr. Co.*, 15 BNA OSHC 1614, 1616-17, 1991-93 CCH OSHD ¶ 29,681, p. 40,240 (No.

> 89-2019, 1992). In order for an employer to establish that section 8(a) requires the suppression of evidence obtained before the presentation of credentials, it must show that it had a reasonable expectation of privacy in the worksite. *E.g.*, *Hamilton Fixture*, 16 BNA OSHC 1073, 1078 & n.9, 1993 CCH OSHD ¶30,034, p. 41,173 & n.9 (No. 88-1720), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994); *Laclede Gas*, 7 BNA OSHC at 1877, 1979 CCH OSHD at p. 29,153; *Accu-Namics*, 1 BNA OSHC at 1754-55, 1973-74 CCH OSHD at p. 22,233. Where an area is outdoors and open to public view, there is no expectation of privacy, and the area is therefore not subject to the Fourth Amendment under the "open fields" doctrine.

Gem Industrial, Inc., p. 4 of decision (No. 93-1122, 1995).

Compliance officers are given a wide latitude when inspecting outdoor activities, such as the construction being performed by Willson. A construction site is not an area in which an employer has a reasonable expectation of privacy. According to the "open fields" doctrine:

> [A]n individual may not legitimately demand privacy for activities conducted out of doors, in fields, except in the area immediately surrounding the home.
>
> . . .
>
> There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. . . . [Therefore,] the asserted expectation of privacy in open fields is not an expectation that "society

recognizes as reasonable." *Oliver v. United States*, 466 U.S. 170, 178-79 (1984).

"An open field need be neither 'open' nor a 'field' as those term are used in common speech." *Id.*, 466 U.S. at 180 n.11. *See, e.g., United States v. Fahey*, 769 F.2d 829 (1st Cir.1985) ("open fields" doctrine applied to mining site in open desert); [*United States v.*] *Marbury*, 732 F. 2d 390, 398 (doctrine applied to large tract of commercial property, including gravel pits and roadways). . . .

See also Ackerman Enterprises, Inc. [10 BNA OSHC 1709, 1712, n.13] ("There is no violation of fourth amendment rights when a government agent's observations occur in 'the open fields' . . . even if the government agent trespasses on private property to make his observations").

Tri-State Steel, 15 BNA OSHC 1903, 1909-10 (Nos. 89-2611 and 89-2705, 1992).

The videotape is admissible under the "open fields" doctrine.[2]

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[2] Although the Secretary also argued that Willson's worksite was in "plain view," Anderson's inspection fails to meet the requirements of the "plain view" exception.

> There are two significant limitations to the "plain view" doctrine. . . . [T]he "plain view" doctrine can only be applied when the OSHA inspectors make their "plain view" observations from a location where they are legally justified in being. . . .
>
> "The second limitation is that the discovery of evidence in plain view must be inadvertent. . . . [W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize

ALLEGED VIOLATION

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

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it, the situation is altogether different." *Coolidge [v. New Hampshire*, 403 U.S. 443, 469-470].

Tri-State Steel, 15 BNA OSHC at 1909.

Anderson was legally justified in being on the roof of the Peabody Hotel, having received permission from the hotel's director of safety. His viewing of the evidence was, however, anything but inadvertent. His supervisor sent Anderson to the Peabody Hotel for the express purpose of gaining a vantage point from which he could view the Center. Anderson arrived at the hotel equipped with a video camera in anticipation of taping Willson's worksite. The videotape does not constitute a "plain view" inspection.

The Secretary alleges that Willson committed a willful violation of § 1926.750(b)(1)(ii).[3] The citation reads:

> On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. The nets shall be hung with sufficient clearance to prevent contacts with the surface of structures below.

In the alternative, the Secretary's citation alleges a willful violation of § 1926.105(a), that states:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

(a) Applicability

The applicability of § 1926.750 and § 1926.105(a) to fall hazards during steel erection has been extensively litigated before the Commission and the courts of appeals. The position now taken by the Commission, which is in line with that of the courts of appeals in four different circuits, is that § 1926.750 applies to falls to the interior of a structure during

---

[3] § 1926.750(b)(1)(ii) provides:

> On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. The nets shall be hung with sufficient clearance to prevent contacts with the surface of structures below.

steel erection, and that § 1926.105(a) applies to falls to the exterior of a structure during steel erection. *See Brock v. Williams Enterp.*, 832 F.2d 567 (11th Cir. 1987); *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985); *Donovan v. Adams Steel Erection*, 766 F.2d 804 (3d Cir. 1985); *Donovan v. Daniel Marr & Sons*, 763 F.2d 477 (1st Cir. 1985); *Bratton Corp.*, 14 BNA OSHC 1893 (No. 83-132, 1990). Willson does not dispute the applicability of § 1926.750(b)(1)(ii) to the present case.

Willson argues, however, that § 1926.105(a) is inapplicable because any fall hazard to which its employees were exposed was to the interior of the structure. Anderson testified that during the time he observed Manley and McVay, they were exposed to fall hazards to both the interior and the exterior of the structure (Tr. 24). James Willson, Willson's vice-president of field operations, stated that, based on his viewing of Exh. C-4, Manley and McVay would have fallen to the interior of the structure (Tr. 174). Manley, who was in the best position to know, stated that if he had fallen, it would have been to the structure's interior (Tr. 83). Manley's testimony is the most convincing on this issue. It is determined that Willson's employees were not exposed to an exterior fall hazard. Therefore, § 1926.105(a) is inapplicable to the present case.

(b) Noncompliance

The record establishes that Willson's employees were working on a structure not adaptable to temporary floors, and that they were using no form of fall protection. Willson argues that the Secretary failed to prove that the potential fall distance exceeded two stories or 25 feet because Anderson did not measure

the distance (Tr. 44). This argument is without merit.

Anderson estimated the distance to be more than 80 feet (Tr. 10). Manley estimated the potential fall distance to be approximately 75 feet (Tr. 90). Both witnesses were credible and appeared more than capable of determining whether or not a distance exceeded 25 feet. The lowest estimate was three times the distance that triggers the standard's applicability. Based on the testimony of Anderson and Manley, it is concluded that the potential fall distance was between 75 and 80 feet. The Secretary has proven that Willson failed to comply with § 1926.750(b)(1)(ii).

(c) Exposure

It is undisputed that Manley directed McVay to accompany him to work in an area where the fall protection cable had not been strung. Manley and McVay were exposed to the hazard of falling.

(d) Employer Knowledge

Manley considered himself to be and identified himself to Anderson as a foreman for Willson (Tr. 26, 77). Since Manley was one of the employees observed working without fall protection, he had actual knowledge of the standard's violation. "The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer." *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993).

Willson argues that, despite Manley's designation as a foreman, he was not a supervisory employee and that his knowledge cannot be imputed to the company. Willson claims that Manley was actually "more of a leadman" assigned to lead his crew of three men every

day. Manley was paid the same as the other ironworkers and had no power to hire or fire employees (Tr. 151-152). "General foremen," which Willson says are the real supervisory employees, are paid a higher hourly wage than the other ironworkers and are given company trucks. Willson had not given Manley a truck (Tr. 182-183).

The criterion for being considered a foreman under the Act is not stringent. "An employee who had been delegated authority over other employees, even only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537 (Nos. 86-360 and 86-469, 1992). Even though Manley was not accorded all the privileges and responsibilities of Willson's general foremen, he did wield authority over his crew. Counsel for Willson questioned James Willson regarding Manley's duties (Tr. 151-153):

Willson: Randy had three guys and himself that he was to work with on certain areas.

. . .

Q.: What, besides directing the employees on instructions you gave him, authority did he have with respect to the crew?

Willson: Well, being the leadman, he determined how he was going to do his work in the area and when he was supposed to do it.

Q.: Any other?

Willson: Pertaining to?

Q.: Supervising these individuals.

Willson: Yes. He would have certain responsibilities to follow company policies and procedures.

. . .

Q.: What, if any, employees were not responsible for enforcing company policy?

Willson: Well, the average ironworker wasn't. They were responsible for their own personal protection. Randy would be to enforce to his limits, if he had a problem. Then it would be my overall responsibility.

Willson delegated the authority to Manley to instruct his crew in its work assignment each day. Manley felt the duty to keep his men busy and planned ahead "so they never had to stop [work]" (Tr. 78). He told them where and how to perform their assigned duties. He had responsibility to enforce company policy on his crew, a responsibility in which his crew did not share. "It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority; an employee who is empowered to direct that corrective measures be taken is a supervisory employee." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The Secretary has established that Manley was a supervisory employee within the meaning of the Act. Therefore, his knowledge that he and McVay were working at least 75 feet above the ground with no fall

protection is imputed to Willson. Willson had knowledge of the violation.

The Secretary has proven that Willson committed a violation of § 1926.750(b)(1)(ii).

WILLSON'S UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

Willson asserts the affirmative defense that any violation it committed was the result of unpreventable employee misconduct. In order to prove the affirmative defense of unpreventable employee misconduct, an employer must prove that:

(1) it had established work rules designed to prevent the violation;

(2) the work rules had been adequately communicated to its employees; and

(3) it had taken steps to discover violations, and had effectively enforced the rules when violations had been discovered.

Falcon Steel Co., 16 BNA OSHC 1179, 1193 (No. 89-3444, 1993).

(1) Established Work Rules

Willson had an established work rule requiring its employees to tie off at heights above 10 feet (Tr. 143).[4] Anderson testified that Willson had a good written safety program (Tr. 70). Lawrence Falck, an area director for OSHA, testified that Willson's safety rules were adequate as written (Tr. 119).

---

[4] This is more stringent than the OSHA standard, which requires employees to tie off at heights of 25 feet.

(2) Adequate Communication

Falck also testified that Willson adequately communicated its safety rules to its employees (Tr. 119). Willson held weekly safety meetings which emphasized the use of fall protection (Tr. 84).

(3) Effective Enforcement

The only element of the defense that the Secretary disputes is whether Willson effectively enforced its work rule. In its defense, Willson asserts that it has a disciplinary program by which employees are reprimanded for safety infractions (Exhs. R-12, R-13). Willson hired a safety consultant periodically to inspect its worksite to ensure compliance with safety standards (Tr. 153). Willson fired ironworkers at the Center worksite for not using fall protection (Tr. 130).

The testimony of Manley undermines Willson's argument that it effectively enforces its safety rules. When asked if he expected to be disciplined by Willson for failing to tie off, Manley responded (Tr. 86-87):

> Well, we going to get right down to it, if OSHA was on the job, yes. If OSHA wasn't on the job, it's a completely different story. . . . Because OSHA's on the job, we all got radios in our hand, telling you right where they're going to be at, every section. Every time they walk around the corner, somebody's on the radio telling us right where they're at. "I got something. They're on the corner," hollering at us up on the radio, "All right, they're coming in your area. Make sure all your people is tied off. Make sure everything is safety there."

This admission provides insight into Willson's attitude towards enforcement, especially coming from a supervisory employee.

> Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision . . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.

Archer-Western Contractors Ltd., 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). What Manley described implicates Willson's employees throughout its worksite. Willson did not contradict or discredit Manley's description of what occurs during an OSHA inspection. Manley stated that he expected to be disciplined only if OSHA was on the site. Willson failed to establish that its work rules were effectively enforced. Therefore, its unpreventable employee misconduct defense must fail.

WHETHER THE VIOLATION WAS WILLFUL

The Secretary alleged that Willson's violation of §1926.750(b)(1)(ii) was willful. A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.

> A willful violation is differentiated from others by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. Logically, then, a willful charge is not justified if

> an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

Falcon Steel Co., 16 BNA OSHC at 1181.

The Secretary asserts the following reasons in his post-hearing brief for classifying the charge as willful:

- The violation occurred over a period of 45 minutes.
- Manley and McVey were working at heights in excess of 75 feet.
- Manley chose to work rather than waiting for safety cables to be sent up.
- Manley was a supervisory employee.
- Willson was aware that it was having ongoing problems concerning the use of fall protection at its site.

Of these five factors, only the last two have any bearing on whether Willson's violation was willful or not. The first three items are factors in establishing that Willson committed a serious violation. They do not tend to show that Willson acted with intentional disregard or plain indifference to employee safety. The fact that Manley committed a violation of the Act even though he was supervisory employee could demonstrate a tendency for an intentional disregard of the Act's requirements.

The strongest evidence the Secretary has of willful conduct is Willson's awareness of problems relating

to fall protection prior to the violation at issue. The Secretary had issued a citation for failure to use fall protection approximately two months before the inspection that gave rise to the present case. Even though the Secretary subsequently withdrew the citation, Willson was on notice that one of its employees had violated its safety rules. A few days before Anderson's inspection in the present case, CKH notified Willson that one of its ironworkers had been observed working without fall protection (Exh. C-5; Tr. 175).[5]

Despite the evidence of these prior incidents, the Secretary has failed to establish that Willson's violation of §1926.750(b)(1)(ii) was willful. The record does not demonstrate that Willson exhibited either intentional disregard for the Act, or plain indifference to its employees' safety. Willson has a good written safety program. It holds weekly safety meetings. Frank McDaniel, CKH's safety manager for the Center, testified that Willson was a safe steel erector "as ironworkers go" (Tr. 129). He stated that most of the problems Willson had with getting employees to tie off came from employees who had not been with the company for very long[6]: "Of the group or the individuals who seemed to constantly violate the standards,

---

[5] Although arguing that the Secretary failed "to prove" the CKH notification referred to a Willson employee, James Willson testified that he believed it to be "a Willson safety violation and [the notice was meant] to make sure we're reviewing it with our men, which we did" (Tr. 175).

[6] Willson's contract for the Center specified that Willson was required to hire a certain percentage of local workers for the job. James Willson estimated that 80% to 90% of Willson's employees at the Center were local (Tr. 148).

either the Willson safety program or OSHA in general, they seemed to be local hires predominately. I really cannot remember of any time that I had to write up an actual Willson employee who had been with the company for any length of time" (Tr. 130).[7] McDaniel said that he knew of ironworkers that Willson had fired for failing to use fall protection (Tr. 130).

The fact that the problem employees were ones more recently hired does not excuse Willson's violation of the cited standard. It is the employer's responsibility to enforce the OSHA standards with respect to all of its employees. But it is significant that Willson's long term employees exhibited none of the recalcitrance of the recently hired employees in using fall protection. This indicates that the company did emphasize fall protection and that the veteran employees had absorbed this ethos. The violation is properly classified as serious.

PENALTY DETERMINATION

"Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give 'due consideration' to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624.

Willson employed approximately 130 employees at the time of the inspection. On the center project itself Willson had reduced its workforce to 30 employees by that date (Tr. 154). Willson cooperated

[7] Manley had worked for Willson for less than a year at the time of Anderson's April 1994 inspection (Tr. 77).

with the inspection and demonstrated good faith in its dealings with the Secretary (Tr. 73). The Secretary had previously cited Willson for violations of the Act (Exh. R-1).

The gravity of the violation is the most significant factor to be considered when assessing a penalty. "The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id.* In the present case, two employees were exposed for the extended period of 45 minutes. They took no precautions against falling. They were exposed to a fall hazard of at least 75 feet, which would have resulted almost certainly in death had they fallen. The gravity of the violation is extremely high.

Based upon these factors, it is determined that a penalty in the amount of $7,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ordered that:

Item 1 of Citation No. 1, alleging a violation of §1926.750(b)(1)(ii), is affirmed as serious, and a penalty of $7,000.00 is assessed.

/s/ NANCY J. SPIES
NANCY J. SPIES
Judge

Dated: May 25, 1995

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1492
94-1546

L. R. WILLSON AND SONS, INCORPORATED, PETITIONER

v.

OCCUPATIONAL SAFETY & HEALTH REVIEW
COMMISSION, RESPONDENT

[Filed: March 27, 1998]

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The government's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX G

STATUTORY AND REGULATORY PROVISIONS

1. Section 5 of the Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1593, 29 U.S.C. 654, provides as follows:

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

2. Section 17 of the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1606, as amended, 29 U.S.C. 666, provides as follows:

§ 666. Civil and criminal penalties

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a

civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(b) Citation for serious violation

Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Citation for violation determined not serious

Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

(d) Failure to correct violation

Any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 659 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

(e) Willful violation causing death to employee

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Giving advance notice of inspection

Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) False statements, representations or certification

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(h) Omitted

(i) Violation of posting requirements

Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) Authority of Commission to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(l) Procedure for payment of civil penalties

Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the

violation is alleged to have occurred or where the employer has its principal office.

3. The occupational safety standard involved in this case, 29 C.F.R. 1926.750(b)(1)(ii), provides as follows:

§ 1926.750 Flooring requirements.

* * * * *

(b)(1)(ii) On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. The nets shall be hung with sufficient clearance to prevent contacts with the surface of structures below.

Supreme Court, U.S.
FILED
SEP 30 1998
CLERK

No. 98-188

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALEXIS M. HERMAN, SECRETARY OF LABOR,
PETITIONER

v.

L. R. WILLSON AND SONS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent concedes the existence of a circuit conflict over the second question presented in the petition —whether "unpreventable employee misconduct" is an affirmative defense to employer liability for a workplace health or safety violation under the Occupational Safety and Health Act or, instead, is "part of the Secretary's case-in-chief" (Br. in Opp. 4)—and it acknowledges that the petition properly presents that question. *Ibid.*; see *id.* at i, 3, 6. Respondent nonetheless contends that the Court should not review that question in this case, on the grounds that its resolution was "not essential" to the decision below and "does not raise or create substantial questions of federal safety and health

policy." *Id.* at 4, 6. In addition, respondent argues that the first and third questions stated in the petition—whether in every case the Secretary must show actual or constructive employer "knowledge" of a violation as part of her case in chief, and which party bears the burden of establishing such knowledge for purposes of determining whether a violation is properly classified as "serious" under the Act—are not properly presented in this case. *Id.* at i, 3, 6. Those grounds for opposing review are unpersuasive.

1. Respondent concedes that the petition's central question, concerning which party bears the burden of persuasion on the issue of "unpreventable employee misconduct," is properly presented. See Br. in Opp. i, 3, 6 (arguing only that the first and third questions are not properly presented). It further acknowledges that "there is disagreement between some circuits on this issue." *Id.* at 4; see also Pet. 15-18; Pet. App. 11a & nn.29-30. Respondent argues, however, that the question does not merit review in this case because the decision below "expressly did not turn on that question." Br. in Opp. 5. That is not a plausible reading of the court of appeals' opinion. See Pet. App. 10a-12a.

Respondent contends that the court first relied on its decision in *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979) to hold, dispositively, "that the Commission improperly had shifted the burden of proving employer knowledge to the Respondent" in the context of the Secretary's case-in-chief. Br. in Opp. 2. From that premise, respondent reasons that the discussion of "unpreventable employee misconduct" in the court's opinion "was not essential to the result" reached by the court. *Id.* at 4. The court's discussion cannot, however, be so neatly subdivided. To the contrary, as the petition points out (at 14), the opinion simply

conflates the employer "knowledge" and "unpreventable employee misconduct" questions.

Respondent's own petition for review in the court of appeals separately identified and addressed both the "knowledge" and the "misconduct" issues. Resp. C.A. Br. 2, 26-33; see also Resp. C.A. Reply Br. 5-6.[1] Moreover, although respondent's opening brief cited *Ocean Electric* only in arguing that respondent lacked "knowledge" of the alleged violation in this case (see Resp. C.A. Br. 13, 27), its reply brief argued, contrary to the position advanced by the Secretary (Gov't C.A. Br. 34-35 & n.12), that in *Ocean Electric* the court had already "ruled definitively that the Secretary bears the ultimate burden of persuasion on the defense of unpreventable employee misconduct" (Resp. C.A. Reply Br. 5). The court of appeals resolved that controversy between the parties, and made clear its position on an issue that has divided the circuits, both by "reaffirm[ing]" *Ocean Electric*'s allocation of the initial burden of persuasion and by expressly applying the same rule to the issue of "unpreventable employee misconduct." Pet. App. 11a-12a & nn.29-30 (citing *Ocean Electric* in describing circuit conflict). Thus, contrary to respondent's suggestion, the court's holding that "unpreventable employee misconduct * * * must be disproved by the Secretary in [her] case-in-chief" (*id.* at 11a) was plainly integral to its disposition of this case. Indeed, at the outset of its opinion the court summarized its ruling as follows: "Because we find that the [Occupational Safety and Health Review] Commission erred in placing the burden of showing the unfore-

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[1] For the Court's convenience, we have lodged copies of these briefs with the Clerk of the Court.

seeability or preventability of the violation in question on [respondent], we reverse." *Id.* at 2a.

2. Respondent argues further (Br. in Opp. 6) that the question whether an employer must prove "unpreventable employee misconduct" to escape statutory liability for the violation of a workplace health or safety standard, or whether instead the Secretary must *disprove* such misconduct in order to *impose* liability, "does not raise or create substantial questions of federal safety and health policy." That is incorrect.

As the petition explains (at 13-14), the specific definition of an affirmative defense of employee misconduct, which the Secretary recognizes as an appropriate basis for an employer to avoid liability for safety violations by its employees, inherently reflects policy-based judgments concerning the appropriate interpretation and enforcement of the Act.[2] Compare *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275, 2292-2293 (1998) (explaining reasons for recognizing, and defining the elements of, affirmative defense to employer liability in sexual harassment cases); *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401-403 (1983). Incorrect assignment of the burden of persuasion on that defense is out of keeping not only with the language and purposes of the Act, but with the appropriate role of the Secretary in determining how the Act should be administered. Moreover, as we explain below, resolution of the misconduct question is analyti-

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[2] To establish the "unpreventable misconduct" defense, an employer must generally show (1) that it has established work rules designed to prevent the charged violation; (2) that those rules have been adequately communicated to its employees; and (3) that it has taken steps to discover violations, and has effectively enforced its rules when violations were discovered. See Pet. 10.

cally closely linked to resolution of the threshold question whether the Secretary bears the burden of demonstrating employer "knowledge" of a violation as part of her prima facie case—an issue that respondent concedes (Br. in Opp. 5) is central to enforcement policy under the Act.

3. Finally, respondent argues that the first and third questions stated in the petition—whether the Secretary must show actual or constructive employer "knowledge" of a violation as part of her case in chief, and which party bears the burden of establishing such knowledge for purposes of determining whether a violation is properly classified as "serious" under the Act—are not properly presented in this case. Br. in Opp. i, 3, 6. That is not correct.

In its petition for review to the court of appeals (and in its subsequent reply brief), respondent presented and addressed separate questions corresponding to the first two questions presented in the Secretary's certiorari petition: "Whether the Commission erred in finding that [respondent] had actual or constructive knowledge of the alleged violations," and "Whether [respondent] established the affirmative defense of unpreventable employee misconduct." Resp. C.A. Br. 2; see *id.* at 26-33; Resp. C.A. Reply Br. 5-6. As discussed above, the court of appeals treated those questions together, interpreting its prior holding in *Ocean Electric* that the Secretary "bore the burden of proving that [a] supervisory employee's acts were not unforeseeable or unpreventable," 594 F.2d at 401, to compel the conclusion, in this case, that "unpreventable employee misconduct * * * must be disproved by the Secretary in [her] case-in-chief." Pet. App. 10a-12a. The certiorari petition explains (at 12-15) that the court erred both in failing to distinguish between those two ques-

tions raised by respondent and in resolving each of them against the Secretary. It is clear, however, that the court effectively ruled on both questions.[3]

Moreover, the court could not have resolved the first question presented to it by respondent (and presented to this Court by the Secretary's petition), concerning proof of actual or constructive employer knowledge as part of the Secretary's case-in-chief, against the Secretary without also implicitly resolving the third question, which is whether the absence of the same type of knowledge is properly, under the Act, an affirmative defense to the classification of a violation as "serious." See Pet. i, 11, 14-15. Fairly read, the court of appeals' decision requires the Secretary to establish employer "knowledge," *and* to disprove the existence of unforeseeable employee misconduct, as part of her prima facie case, in any proceeding in which those issues may arise. Questions on which the court of appeals has passed in arriving at its judgment are properly presented for review by this Court. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

As respondent points out (Br. in Opp. 2-3, 6), in litigating this case below the Secretary did not, until her petition seeking en banc review in the court of appeals, specifically challenge applicable precedent requiring her to prove employer "knowledge" of a charged violation as part of her case-in-chief. See, *e.g.*, Gov't C.A. Br. 28 (acknowledging that "Commission precedent requires" Secretary to prove employer

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[3] Indeed, as discussed above, for other purposes respondent argues that the court held *only* that the Secretary must bear the burden of proving employer "knowledge" in her prima facie case. See Br. in Opp. 2, 4-5 & n.2.

knowledge); *id.* at 31-32, 35 n.12 (acknowledging "this Circuit's holding" in *Ocean Electric*, but seeking to distinguish that case); compare Gov't Pet. for Reh'g En Banc (Gov't Reh'g Pet.) 10, 13-14 & n.8. From the outset, however, the Secretary's essential claim has been that respondent is liable, under the Act, for specified acts by its employees (including a supervisor) in violation of an applicable safety standard, unless respondent can demonstrate (as the ALJ held it could not, see Pet. App. 58a-60a) that those acts constituted unforeseeable or unpreventable employee misconduct within the meaning of the limited affirmative defense recognized by the Secretary. If the first and third questions presented in the petition are "new," they are merely new arguments in support of that consistent claim; and they have been clearly raised at the outset in seeking review by this Court, which is not bound by any contrary Commission or circuit precedent. See *Lebron*, 513 U.S. at 379; *Williams*, 504 U.S. at 44; see also Gov't Reh'g Pet. 10, 13-14.[4]

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[4] Section 11(a) of the Act, 29 U.S.C. 660(a), provides that "[n]o objection that has not been urged before the Commission shall be considered by the court [on judicial review], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." All three questions presented in the certiorari petition were necessarily resolved by the ALJ (acting for the Commission) when she required the Secretary to prove employer "knowledge," placed the burden of showing "unpreventable employee misconduct" on respondent, and ultimately found the existence of a "serious" violation. See Pet. App. 52a, 58a, 65a. Before the ALJ and the Commission, both parties agreed that the employer bore the burden of proving "the affirmative defense of unpreventable employee misconduct." See, *e.g.*, Resp. Pet. for Discretionary Review 8. The Secretary did not challenge before the ALJ the requirement that she prove employer "knowledge" in her case-in-chief: Commission precedent on

More fundamentally, however, while the court of appeals erred in failing to distinguish clearly between the question of employer "knowledge" as part of the Secretary's prima facie case and the question of which party bears the burden on the unpreventable misconduct defense, it did not err in regarding those questions as related. It would be difficult to analyze comprehensively whether "unpreventable employee misconduct" is an affirmative defense, as to which an employer must bear the burden of proof, without first inquiring what the Secretary must show, under the Act, in order to establish a prima facie case of liability on the part of the employer for the acts of its employees; and one cannot fairly determine what role employer "knowledge" plays in the Secretary's prima facie case without taking account of the Act's express reference to employer "knowledge" in distinguishing between "serious" and non-serious violations (see 29 U.S.C. 666(k)). See Pet. 9-12. Thus, although our certiorari petition sets out three separate questions in an effort to identify the relevant issues as clearly as possible for this Court, in our view all three of those questions would be fairly included within the single alternative question sug-

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the point was clear, and the involvement of a supervisory employee in the present violation was sufficient to satisfy the Commission's "knowledge" requirement. Pet. App. 55a-58a. The Secretary had neither reason nor opportunity to raise that issue before the Commission, because the ALJ affirmed the Secretary's citation, and the Commission denied Respondent's request for discretionary review of the knowledge and misconduct issues. Compare Resp. Pet. for Discretionary Review 3 (requesting review on three issues) with Pet. App. 41a-42a (directing review of evidentiary issue only). Under these circumstances, Section 11(a) does not bar judicial review of the questions presented by the petition. Compare Pet. App. 12a (holding respondent's challenge to amount of fine foreclosed by Section 11(a)).

gested by respondent (Br. in Opp. i). In either event, all of the issues raised by the petition are properly presented, and the Court should consider and resolve them together.

* * * * *

"Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976). As the petition points out (at 18), the interrelated burden-of-proof questions presented in this case arise, in one form or another, in virtually every enforcement proceeding under the Act. This Court's review is necessary in order to resolve those questions and to bring order to the lower courts' "confusing patchwork of conflicting approaches" to the relevant issues. *L.E. Myers Co.* v. *Secretary of Labor*, 484 U.S. 989, 990 (1987) (White & O'Connor, JJ., dissenting from the denial of certiorari).

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 1998

Supreme Court, U.S.
FILED
SEP 15 1998
OFFICE OF THE CLERK

No. 98-188

In The

Supreme Court of the United States

October Term, 1997

ALEXIS M. HERMAN, SECRETARY OF LABOR,

Petitioner,

v.

L.R. WILLSON AND SONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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25 pp

QUESTION PRESENTED

The questions presented by the Secretary of Labor ("Secretary") are too broad. The Secretary never presented questions 1 or 3 to the Fourth Circuit Court of Appeals, the Occupational Safety and Health Review Commission ("the Commission"), or to Administrative Law Judge Nancy Spies. The only question presented is:

Whether the Secretary bears the burden of proving that a supervisor's misconduct, which results in an apparent violation of the Occupational Safety and Health Act of 1970 (the "Act" or "OSHA"), was not unforeseeable or unpreventable.

PARTIES TO THE PROCEEDING

Petitioner accurately identifies the parties to the proceeding.

L.R. Willson and Sons, Inc., a Maryland corporation, has no parent or subsidiary companies.

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29 C.F.R. § 2200.34 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Secretary improperly identifies the statutory and regulatory provisions involved. No questions were presented below concerning sections 5 and 17 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 654 and 666. No questions were presented below concerning steel erection standards, or specifically, 29 C.F.R. § 1926.750(b)(1)(ii).

If any statutes or regulations are pertinent to the Secretary's petition, they are Sections 9, 10, 11, and 12 of the Act, 29 U.S.C. §§ 658, 659, 660, and 661, and the Commission's rule on affirmative defenses, 29 C.F.R. § 2200.34, reproduced *infra* at App. 1-12.

STATEMENT OF THE CASE

The Respondent is satisfied with Petitioner's presentation, except to the extent modified or supplemented as follows:

1. Petitioner states, falsely, that the Secretary characterized the sole citation as "willful" because she had "recently cited respondent for a number of alleged violations of the Act. . . . " (Pet. at 3.) On the contrary, the Secretary had withdrawn a fall protection citation against Respondent due to unpreventable employee misconduct, and the willful characterization wholly was unrelated to any earlier citations. (Pet. App. at 47a.)

2. Petitioner correctly describes the administrative law judge's ("ALJ") reasoning contained in her opinion,

but gives a patently false impression of Manley's testimony. Manley's testimony, as noted in oral argument by the Fourth Circuit Court of Appeals' panel, was not that discipline was relaxed when OSHA was not on the job. Rather, it was that Respondent was more vigilant at uncovering safety violations when OSHA was on the job, which, given the Secretary's enforcement policy and attitude, is understandable.

3. Respondent is satisfied with Petitioner's statement.

4. The Petitioner incorrectly accuses the court of appeals of commingling the issues of "knowledge" and "unpreventable employee misconduct." The court, however, treated these issues separately. (Pet. App. at 10a-12a.) The Fourth Circuit first found that the Commission improperly had shifted the burden of proving employer knowledge to the Respondent. (Pet. App. at 10a-11a.) The court then noted its disagreement with other circuits on the role "unpreventable employee misconduct" plays in the Commission's burden of proof. (Pet. App. at 11a.)

5. The Secretary never argued to the Fourth Circuit Court of Appeals that *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979), should be overruled.[1] Rather, the Secretary embraced the holding of *Ocean Electric*, which states that the Secretary must prove that a

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[1] The Secretary's Brief to the Fourth Circuit has been lodged with the Clerk of this Court.

supervisor's misconduct was not idiosyncratic or unforeseeable if the issuance of a citation solely is based on supervisory misconduct. *Id.* at 401. Because Manley forced a subordinate to violate Respondent's rules, the Secretary argued that the citation was not solely based on Manley's misconduct. (*See* Secretary's Brief to Fourth Circuit at 31-34.) The Fourth Circuit flatly rejected this argument. (Pet. App. at 11a n.28.)

Further, the Secretary never argued to the Fourth Circuit that she did not have to prove employer knowledge of a violation as part of her case-in-chief. Rather, she acknowledged that it was Commission precedent, affirmed without split in the circuits, that she must prove "the employer had knowledge or constructive knowledge of the condition." (*See* Secretary's Brief to Fourth Circuit at 28.)

REASONS FOR DENYING THE PETITION

The Secretary never raised, and consequently the court of appeals and the Commission never addressed, the core issues raised in her petition. The Secretary never questioned her burden, under Commission and federal court of appeals precedent, to prove employer knowledge of a violation of an OSHA standard when prosecuting a citation. It would be imprudent to grant certiorari as to questions 1 and 3 in the Secretary's petition. It is the Secretary, not the court of appeals, who is attempting to conflate the knowledge issue with the issue of unforeseeable employee misconduct.

The Secretary's petition is a clever ploy to reduce her burden of proof in OSHA cases, not determine what role employee misconduct plays in the burden of proof scheme.[2] The only transparent reason the Secretary's petition is before this Court is because of six words in the opinion below: "Although some sister circuits have held . . . " (Pet. App. at 11a.) If the Fourth Circuit had omitted the paragraph beginning with these words, its holding would have been the same. The Fourth Circuit would have relied upon *Ocean Electric, supra,* the case which "is clearly the law of [the Fourth] circuit," (Pet. App. at 11a-12a), and the proof issue would remain as stated twenty years earlier by the court of appeals.

The court of appeals, however, felt compelled to state – although it was not essential to the result – that unpreventable employee misconduct was not an affirmative defense, but part of the Secretary's case-in-chief. (Pet. App. at 11a.) Certainly, there is disagreement between some circuits on this issue, but the issue itself is not crucial. All the circuits agree that unpreventable employee misconduct is pertinent to a determination of an OSHA violation. *See P. Gioiso & Sons, Inc. v. OSHRC,*

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[2] The Secretary's elegant statutory argument on employer knowledge only being related to the "serious" characterization of a citation does not hold up under scrutiny. For nearly 30 years, the Secretary has borne the burden of proving employer knowledge under Commission precedent, and there is no need to disturb that precedent, especially where the question has not been presented below. *See Brennan v. OSHRC,* 511 F.2d 1139, 1143-44 (9th Cir. 1975) (burden is on Secretary to establish employer knowledge of both serious and non-serious violations of the Act).

115 F.3d 100, 109 (1st Cir. 1997); *D.A. Collins Constr. Co. v. Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997); *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1984); *Ocean Electric Co. v. Secretary of Labor*, 594 F.2d 396, 401 (4th Cir. 1979); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir. 1976); *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987); *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018, (7th Cir. 1975); *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1246-47 (8th Cir. 1978); *Brennan v. OSHRC*, 511 F.2d 1139, 1144-45 (9th Cir. 1975); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980); *Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982). This hardly presents a question so profound that certiorari must be granted, especially when the decision below expressly did not turn on that question.

The Secretary admits that the Occupational Safety and Health Administration administratively considers unpreventable employee misconduct in its decision whether to issue a citation. (Pet. at 10.) Indeed, OSHA administratively vacated a citation against Respondent because it concluded, based on its investigation, that the apparent violation had been the result of unpreventable employee misconduct. (Pet. App. at 47a.) OSHA's enforcement policy is not placed in a tailspin by requiring the Secretary, who considers misconduct before issuing a citation, to present such evidence to the Commission as part of her case-in-chief. It would, however, place OSHA's enforcement policy on its head to truncate the Secretary's burden as requested in her petition and no longer require the Secretary to prove employer knowledge of an OSHA violation in her case-in-chief.

Questions 1 and 3 presented by the Secretary have not been sufficiently addressed below. In fact, they have never been addressed by the Secretary, the Respondent, the ALJ, the Commission, or the Fourth Circuit. The Secretary's attempt to raise them here is premature and not supported by any position she has earlier taken. This Court should not, and ordinarily does not, decide questions not raised or litigated in the lower courts. *See City of Canton v. Harris*, 489 U.S. 378, 386-87 (1989); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987); *California v. Taylor*, 353 U.S. 553, 556, n.2 (1957).

The court of appeals applied long-standing Fourth Circuit precedent correctly, ruled in favor of Respondent, and confirmed its view that the Secretary, who conducts OSHA investigations, should bear the burden of proving that the apparent violation was not the result of unpreventable employee misconduct. Any difference in opinion among the circuits as to where the burden of proof should lie regarding unpreventable employee misconduct does not raise or create substantial questions of federal safety and health policy. This is not the appropriate case for this Court to consider the procedural niceties of the unpreventable employee misconduct issue.

CONCLUSION

Respondent respectfully requests that the Secretary's petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

STATUTORY AND REGULATORY PROVISIONS

1. Section 9 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 658, provides as follows:

§ 658. Citations.

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

2. Section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659, provides as follows:

§ 659. Procedure For Enforcement.

(a) If, after an inspection or investigation, the Secretary issues a citation under Section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by

reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 9 (a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9 (a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided

in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

3. Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660, provides as follows:

§ 660. Judicial Review.

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order

of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code.

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a uncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies.

(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

4. Section 12 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661, provides as follows:

§ 661. The Occupational Safety and Health Review Commission.

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out

the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

(b) The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term for six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(c)(1) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph: "(57) Chairman, Occupational Safety and Health Review Commission."

(2) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph: "(94) Members, Occupational Safety and Health Review Commission."

(d) The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

(e) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United State Code.

(f) For the purpose of carrying out its functions under this Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(g) Every official act of the Commission shall be entered of record, and its hearing and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

(h) The Commission may order testimony to be taken by deposition in any proceedings pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and

the person taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) For the purpose of any proceedings before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission.

(j) An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Except as otherwise provided in this Act, the administrative law judges shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5, United States Code. Each administrative law judge shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5, United States Code.

5. The Commission procedural rule in this case, 29 C.F.R. § 2200.34, provides as follows:

§ 2200.34. Employer Contests.

(a) Complaint.

(1) The Secretary shall file a complaint with the Commission no later than 20 days after receipt of the notice of contest.

(2) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:

(i) The basis for jurisdiction;

(ii) The time, location, place, and circumstances of each such alleged violation; and

(iii) The considerations upon which the period for abatement and the proposed penalty of each such alleged violation are based.

(3) Where the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought.

(b) Answer.

(1) Within 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.

(2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.

(3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."

(4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.